(1)

No. 01-849

In The

Supreme Court of the United States

LINDALEE COWLES,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition For Writ Of Certiorari
To The Alaska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an employee in a small office with her own desk whose work area is not accessible to the public but only to her co-workers have a reasonable expectation of privacy under the Fourth Amendment to the United States Constitution so that, without obtaining a warrant, the police may not enter her workplace after hours, anchor a hidden videocamera in the ceiling overhead, aimed at and focusing solely on her desk, and thereby secretly monitor and videotape her activities at her desk?

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PETITION FOR WRIT OF CERTIORARI

Lindalee Cowles ("Cowles") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Alaska Supreme Court entered in this proceeding on June 8, 2001, in order to resolve the conflict between the Alaska Supreme Court's decision and decisions of this Court, federal courts of appeal, and other states' appellate courts on the important issue presented herein.

OPINIONS BELOW

The opinion of the Alaska Supreme Court is officially reported as *Cowles v. State*, 23 P.3d 1168 (Alaska 2001). It is reprinted in the Appendix. (App. 1-43)

The opinion of the Alaska Court of Appeals is officially reported as *Cowles v. State*, 961 P.2d 438 (Alaska App. 1998). It is reprinted in the Appendix. (App. 48-67)

The opinions of the trial court have not been reported. They are reprinted in the Appendix. (App. 68-83)

JURISDICTION

On June 8, 2001, the Alaska Supreme Court rendered its opinion determining that Cowles did not have a reasonable expectation of privacy under the Fourth Amendment to the United States Constitution. (App. 1-43) On July 16, 2001, the Alaska Supreme Court denied Cowles' petition for rehearing. (App. 84-85) On October 2, 2001, in

relation to Application No. 01A302, the Honorable Justice Sandra Day O'Connor granted Cowles an extension to and including November 13, 2001, in which to file a petition for writ of certiorari.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Fourth Amendment to the United States Constitution provides:

> **Searches and seizures.** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Cowles was employed by the University of Alaska Fairbanks ("the University") in the University theatre department box office. The box office is a twelve by eighteen to twenty foot room encased in cement except for the ceiling. Cowles entered the box office through the sole entrance, a door that was locked during non-business hours, and the public purchased tickets at a metal roll-up window that was locked during non-business hours. Although the public thus did not enter the box

office to do business, several employees of the theatre department entered the box office as part of their employment. (App. 2, 26, 55, 121-122)

As part of her job, Cowles handled monies generated by ticket sales, including depositing funds into the theatre department's bank account. Cowles worked mainly at her desk which was toward the back of the office if one were looking in from the ticket window. On her desk, one of the two in the office, Cowles had a computer and several stacks or piles of paper so that from the ticket window one could see Cowles at her desk, but one could not see in detail what Cowles was doing as she worked at her desk. When at her desk, Cowles could see anyone approaching and thus could avoid being surprised by an untrusted onlooker. (App. 29-30, 55, 122)

The University police suspected that Cowles was not depositing all of the monies in the theatre department's account. One weekend, without obtaining a warrant, the University police entered the locked box office, crawled through the vents, and installed a hidden videocamera in the ceiling directly above Cowles' desk. The University police aimed and focused the videocamera solely on Cowles' desk. (App. 1-2, 50)

The following Monday when Cowles returned to work and began processing the weekend receipts, the police turned on the videocamera and videotaped Cowles over an approximately two-and-one-half-hour period. Via the videocamera and videotape the police observed Cowles transfer money from the money pouch into her desk and then transfer cash from her desk to her purse, and correspondingly alter cash deposit records. These

observations prompted and formed the basis for the police immediately obtaining search warrants for Cowles' desk, purse, and person. (App. 2, 34-35, 50)

The warrants were served on Cowles in the box office later that day, and Cowles was then transported to the University police station where she was interrogated and supposedly confessed to the crime of theft. The amount of the alleged theft being greater than $500.00, Cowles was charged with a felony under Alaska law. (App. 48, 50-52, 67)

Prior to trial, Cowles moved to suppress all the evidence that was obtained via the videocamera hidden in the ceiling above her desk or as a fruit of the police videocamera observations. Among other grounds, Cowles argued that the police installing and utilizing the secret videocamera to monitor her activities at her desk violated her right under the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures, as well as her corresponding right under the Alaska Constitution. (App. 86-99)

The trial court denied Cowles' motion. (App. 70-83) In so ruling, the trial court recognized that Cowles had demonstrated an actual expectation of privacy. (App. 73) However, the trial court ruled that Cowles' expectation of privacy was not a reasonable one because there were co-workers in the office who could have seen Cowles' activities had they been stationed close enough to her desk at the appropriate moment and because if one person stood simultaneously at the box office window and at the entry door around the corner, he or she could have seen most if not all of Cowles' activities. (App. 70-76) Although the

trial court indicated that its ruling was based on the Alaska Constitution (App. 70-71), the trial court thereby decided the Fourth Amendment question since the inquiry to determine whether a "search" has occurred under the Alaska Constitution is the same as the inquiry under the Fourth Amendment and Alaska purports to provide its citizens with broader protection than that granted under the Fourth Amendment. (App. 3-4, 17)

Cowles filed a motion for reconsideration of the trial court's decision. (App. 100-103) The trial court denied Cowles' motion. (App. 68-69)

Cowles was convicted at trial. Cowles then appealed to the Alaska Court of Appeals. Before the Alaska Court of Appeals, Cowles reiterated her position that the warrantless monitoring of her activities via the videocamera hidden in the ceiling above her desk violated her rights to be free from unreasonable searches and seizures under the Fourth Amendment and the corresponding provisions of the Alaska Constitution. (App. 104-141) The Alaska Court of Appeals ruled against Cowles, essentially for the reasons voiced by the trial court, though the Court of Appeals added that Cowles' expectation of privacy was not reasonable because she handled money in the course of her job and thus worked in a "fiduciary" capacity. (App. 48-58) Like the trial court, the Alaska Court of Appeals indicated that its ruling was based on the Alaska Constitution. (App. 52-53)

Cowles then petitioned the Alaska Supreme Court to grant discretionary review of Cowles' Fourth Amendment claim as well as of Cowles' claim that she was subjected to a custodial interrogation. (App. 142-151) The

Alaska Supreme Court granted review on both grounds but later dismissed review of the custodial interrogation issue. (App. 44-45)

In her briefs before the Alaska Supreme Court, Cowles once again explained how the warrantless monitoring of her activities via the secret videocamera violated her rights to be free from unreasonable searches and seizures under the Fourth Amendment as well as the corresponding provisions of the Alaska Constitution. (App. 152-182) By a vote of three to two, the Alaska Supreme Court ruled against Cowles, in essence adopting the reasoning of the Alaska Court of Appeals. (App. 1-16) In so ruling, the Alaska Supreme Court expressly stated that it was deciding the issue under both the Fourth Amendment and the Alaska Constitution. (App. 3-4)

Justice Dana Fabe dissented and her dissent was joined by Justice Alexander Bryner. In her dissent Justice Fabe, the present Chief Justice of the Alaska Supreme Court, explained that although Alaska purports to offer broader protection under its state constitution, the decision in Cowles' case is directly contrary to numerous decisions of the United States Supreme Court pertaining to reasonable expectations of privacy in the workplace and pertaining to reasonable expectations of privacy against police surveillance that is more intrusive than one reasonably expects from the public or that is from a vantage point the public would not reasonably be expected to occupy. (App. 22-36, 41-43) Justice Fabe also explained how the Alaska Supreme Court's decision in Cowles' case is directly contrary to or otherwise in conflict with the decisions of several federal courts of appeal,

of at least one other state supreme court, and of at least one other state court of appeals. (App. 21, 26-27, 32-41)

Three days after the Alaska Supreme Court rendered its decision, this Court rendered its decision in *Kyllo v. United States*, 533 U.S. ___, 121 S.Ct. ___, 150 L.Ed.2d 94 (2001). Based on *Kyllo* and based on the Alaska Supreme Court's misreading and misapplication of *O'Connor v. Ortega*, 480 U.S. 709 (1987), Cowles petitioned for rehearing. (App. 183-187) On July 16, 2001, the Alaska Supreme Court denied rehearing. (App. 84-85)

REASONS FOR GRANTING THE WRIT

I. The Alaska Supreme Court's Opinion Directly Conflicts With This Court's Rulings in *O'Connor* and in *Von Raab* Concerning Employees' Reasonable Expectations Of Privacy In The Workplace.

As the dissenting Justices in Cowles' case have observed (App. 24-26), the plurality opinion in *O'Connor, supra*, does not constitute the holding in that case; rather, the concurring opinion of Justice Scalia, coupled with the four-Justice plurality or the four-Justice dissent, as the case may be, comprise the binding precedents in *O'Connor*. *See Marks v. United States*, 430 U.S. 188, 193 (1977). For one, the plurality in *O'Connor* recognized that the majority of the Court – Justice Scalia plus the four-Justice dissent – held that Ortega had a reasonable expectation of privacy in his office. *O'Connor*, 480 U.S. at 718; *see id.* at 730-31 (Scalia, J., concurring in the judgment); *id.* at 737 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting). The plurality also recognized that the

reasonable expectation of privacy is greater where, as in Cowles' case, there is no established office practice, procedure, or regulation authorizing the intrusion and the intrusion is by the police rather than by the employer. *Id.* at 716-17.

"It is privacy that is protected by the Fourth Amendment, not solitude." *Id.* at 730 (Scalia, J., concurring in the judgment). Thus, Justice Scalia concluded that "one's personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded." *Id.* Accordingly, "although an employee might well have no reasonable expectation of privacy with respect to an occasional visit by a fellow employee, he would have such an expectation as to an after hours search of his locked office by an investigative team seeking materials to be used against him at a termination proceeding," *id.* at 738 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting), and even more so as to such an intrusion by the police seeking evidence of criminal conduct, *id.* at 717 (plurality opinion).

Cowles' office was not "subject to unrestricted public access." *Id.* at 731 (Scalia, J., concurring in the judgment). Therefore, Cowles' reasonable expectation of privacy is akin to that of "the secretary working . . . in an office frequently entered by . . . other employees [who] is protected against unreasonable searches of that office by the government." *Id.* at 730. In contrast, the Alaska Supreme Court's opinion establishes an unacceptable double standard where the well-paid professional, executive, or manager with his or her own office is deemed to have a reasonable expectation of privacy in the workplace

while the core force of office workers who share space with their co-workers, the vast majority of whom are women (App. 27), are deemed to live in a fishbowl.

In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the Court indicated that operational realities in the workplace could result in otherwise unreasonable requirements being rendered reasonable, such as physical fitness requirements for military personnel or daily searches of the persons of United States Mint workers. *Id.* at 671. Yet, the Court explained that "these operational realities will rarely affect an employee's expectations of privacy." *Id.* The Alaska Supreme Court has turned the rare instance into the rule that even in the absence of an established office practice, procedure, or regulation, any employee who handles money during the course of her employment has a fiduciary duty that defeats her reasonable expectation of privacy from police surveillance.

II. The Alaska Supreme Court's Opinion Directly Conflicts With Numerous Decisions Of This Court Concerning Police Surveillance From A Vantage Point That The Public Would Not Reasonably Be Expected To Occupy Or Which Is More Intrusive Than One Reasonably Expects From The Public.

In two cases decided by the Court concerning police surveillance from an aerial vantage point above the individual, the rule which has emerged is that an individual has a reasonable expectation of privacy from overhead police observation unless it is routine or commonplace for members of the public to occupy that vantage point. *See Florida v. Riley*, 488 U.S. 445, 450-51 (1989) (plurality

opinion); *id.* at 452-55 (O'Connor, J., concurring); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986). When the public cannot reasonably be expected to occupy the police vantage point, the individual does not knowingly expose his activities to the public but instead retains the Constitution's protection of "what he seeks to preserve as private." *Katz v. United States*, 389 U.S. 347, 351-52 (1967). In Cowles' case, "it was not routine or even possible for members of the public to view Cowles' desk as did the police investigators through their video camera. The public did not have access to the box-office ceiling." (Exc. 34-35); *Cowles*, 23 P.3d at 1182 (Fabe, J., joined by Bryner, J., dissenting). Thus, Cowles' expectation of privacy is a reasonable one.

The same follows from the Court's decisions concerning police surveillance that is more intrusive than one reasonably expects from the public. For example, in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the Court observed that "[t]he Government inspector, however, is not an employee. Without a warrant he stands in no better position than a member of the public." *Id.* at 315. Thereafter, in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), the Court held that a town justice issuing a warrant violated the Fourth Amendment where he viewed films without paying for them and removed wrappers from printed materials, because thus "he was not seeing them as a customer would ordinarily see them." *Id.* at 329. More recently, in *Bond v. United States*, 529 U.S. 334 (2000), the Court reaffirmed that citizens have a reasonable expectation of privacy from government observation that exceeds the intrusiveness expected from members of the public, holding there that a bus passenger who could

expect his soft-sided luggage to be ordinarily handled by other passengers or bus employees nonetheless had a reasonable expectation of privacy that the police would not "feel the bag in an exploratory manner." *Id.* at 339.

The overintrusive nature of the police observation also animates the Court's decision in *Kyllo, supra,* which holds that the police use of thermal imaging constitutes a search:

> The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. The police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful.

Kyllo, 533 U.S. at ___ n.2, 150 L.Ed.2d at 103 n.2. Indeed, Justice Scalia, the author of the majority opinion, described the thermal imaging in *Kyllo* as "somewhat like a video camera showing heat images." *id.*, 533 U.S. at ___, 150 L.Ed.2d at 99, the use of which involved "more than naked-eye surveillance," *id.*, 533 U.S. at ___, 150 L.Ed.2d at 102. Accordingly, under *Kyllo* or even under the approach of the dissent in *Kyllo,* which finds that a search occurs when technology offers the functional equivalent of the police actually being present in the area being searched, *id.*, 533 U.S. at ___, 150 L.Ed.2d at 105; *id.*, 533 U.S. at ___, 150 L.Ed.2d at 108, 110 (Stevens, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ., dissenting), Cowles had a reasonable expectation of privacy that the police would not install a hidden video camera in the ceiling above her desk to monitor her activities.

III. The Alaska Supreme Court's Opinion Is Directly Contrary To Or Otherwise In Conflict With The Video Surveillance Decisions Of Several Federal Courts Of Appeals, Of At Least One Other State Supreme Court, And Of At Least One Other State Court Of Appeals.

The Alaska Supreme Court acknowledges that its decision is contrary to that of the Indiana Court of Appeals in *State v. Thomas*, 642 N.E.2d 240 (Ind. App. 1994), *transfer denied* (Ind. 1995), where the Indiana court held that the Fourth Amendment was violated when, without obtaining a warrant, state officials focused a hidden videocamera on the cash register in a store that the defendant ran under a concession agreement with the state. (App. 14-16)

While the Alaska Supreme Court attempts to distinguish the Hawaii Supreme Court's decision in *State v. Bonnell*, 856 P.2d 1265 (Hawaii 1993), which held that video surveillance via a camera hidden in the smoke detector in a break room violated the employees' reasonable expectations of privacy under the Fourth Amendment (App. 13-14), *Bonnell* is on point in Cowles' favor. The *Bonnell* court grounded its decision on the exceedingly intrusive nature of video surveillance so that even if the individuals may have had no privacy interest in the break room itself, they had a reasonable expectation of privacy against being secretly videotaped there. *Bonnell*, 865 P.2d at 1276-77. As such, the *Bonnell* court based its decision on that of the Ninth Circuit in *Taketa v. United States*, 923 F.2d 665 (9th Cir. 1991). *See Bonnell*, 865 P.2d at 1277.

In *Taketa*, the federal court of appeals found that a federal agent had a reasonable expectation of privacy in

his office, which was violated by the installation of a hidden videocamera in the ceiling of the office. *Taketa*, 923 F.2d at 669, 678. In addition, the *Taketa* court held that the hidden videocamera also violated the Fourth Amendment rights of a co-worker even though the office was not the co-worker's. *Id.* at 678. In so ruling, the Ninth Circuit based its holding upon the principle enunciated by this Court in *Katz*, *supra*, that "the Fourth Amendment protects people not places," *Taketa*, 923 F.2d at 675 (quoting *Katz*, 389 U.S. at 350), and upon the exceedingly intrusive nature of video surveillance, *see Taketa*, 923 F.2d at 677. The court thus observed that "persons may create temporary zones of privacy within which they may not reasonably be videotaped . . . even when that zone is a place they do not own or normally control, and in which they might not be able reasonably to challenge a search at some other time or by some other means." *Id.* at 677.

Other than the majority of the Alaska Supreme Court, "every court considering the issue has noted [that] video surveillance can result in extraordinarily serious intrusions into personal privacy. . . . If such intrusions are ever permissible, they must be justified by an extraordinary showing of need." *United States v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000) (quoting *United States v. Koyomejian*, 970 F.2d 536, 551 (9th Cir. 1992) (Kozinski, J., concurring)) (alterations in original); *see Nerber*, 222 F.3d at 602-04; *see also Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174, 180 (1st Cir. 1997); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 & n.3 (5th Cir. 1987); *United States v. Torres*, 751 F.2d 875, 822 (7th Cir. 1984); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1442 (10th Cir. 1990). Even *Vega-Rodriguez*, *supra*, upon which the Alaska

Supreme Court relies with little or no discussion (App. 7-8, 26-27), does not support the holding in Cowles' case. In contrast to Cowles' case, the work area there was a vast, open, undivided space and the employees were given clear advance notice that their activities were subject to being videotaped. *Vega-Rodriguez*, 110 F.3d at 180. Accordingly, the court "caution[ed] . . . that cases involving the covert use of clandestine cameras . . . may be quite another story." *Id.* at 180 n.5.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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App. 1

Supreme Court of Alaska.

Lindalee COWLES, Petitioner,

v.

STATE of Alaska, Respondent.

No. S 8831.

June 8, 2001.

Robert John, Law Office of Robert John, Fairbanks, for Petitioner.

Kenneth M. Rosenstein, Assistant Attorney General, Anchorage, Bruce M. Botelho, Attorney General, Juneau, for Respondent.

Before MATTHEWS, Chief Justice, EASTAUGH, FABE, BRYNER, and CARPENETI, Justices.

OPINION

MATTHEWS, Chief Justice.

I. *INTRODUCTION*

After receiving information that University of Alaska box office manager Lindalee Cowles was stealing cash from ticket sales, the University police, without obtaining a warrant, installed a hidden video camera which recorded her in the act of theft. The question in this case is whether the videotape was obtained in violation of Cowles's constitutional rights and therefore should have been suppressed. We answer in the negative.

II. *FACTS AND PROCEEDINGS*

Cowles was convicted of theft in the second degree for stealing cash from the University box office. At trial and before the court of appeals, she contended that the videotape showing her taking money from the University cash bag and transferring it first to her desk and then to her purse should be suppressed because it was the product of an unlawful search. The superior court rejected her argument, as did the court of appeals.[1]

The underlying facts are fully set out in the opinion of the court of appeals. For our purposes it is important to note the following. The videotaping was requested by University officials who had received a report from a co-employee that Cowles was taking cash from ticket receipts. An audit had verified that there were substantial cash shortages. No warrant was obtained. The covert video surveillance took place over the course of two and a half hours during a busy Monday morning in the University box office, a twenty-by-twelve foot room which was occupied by Cowles. The room has one other work station for a co-employee but it is unclear on the record before us whether a co-employee was situated at the other work station during the taping. The video camera was hidden in a ceiling vent, pointed at Cowles's desk. The desk was visible to members of the public through the ticket window and through the open office door and to co-workers and visitors to the office. The tape shows what the trial judge described as "an almost continuous

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[1] *See Cowles v. State*, 961 P.2d 438 (Alaska App. 1998).

flow of traffic about [Cowles's] desk." No sound recording was made.

III. *DISCUSSION*

Cowles contends that the videotaping violated her right to be free from unreasonable searches guaranteed by Article I, Section 14 of the Alaska Constitution and the Fourth Amendment to the United States Constitution and her right to privacy guaranteed by Article I, Section 22 of the Alaska Constitution.

The United States and Alaska Constitutions prohibit not only unreasonable physical searches, but also unreasonable technological searches.[2] Thus placing a hidden video camera in a house in order to record activities there without a warrant is prohibited just as is a warrantless entry to search for evidence. But not all technological monitoring of places or individuals is regarded as a search for constitutional purposes. Photographing a person as she walks in a public park does not raise

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[2] *See Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (attaching listening and recording device to outside of public telephone booth which intercepted telephone calls held to be unreasonable search prohibited by Fourth Amendment to United States Constitution); *State v. Glass*, 583 P.2d 872 (Alaska 1978) (audio recording of conversations involving sale of illegal drugs with consent of buyer held to violate seller's state constitutional right to privacy).

constitutional concerns.[3] But photographing a person in an enclosed public restroom stall is a search.[4]

The general test used to determine whether particular technological monitoring is a search is the expectation of privacy test. Under this test courts ask: "(1) did the person harbor an actual (subjective) expectation of privacy, and, if so, (2) is that expectation one that society is prepared to recognize as reasonable?"[5]

In the present case Cowles obviously did not believe that her activities were being monitored by a video camera from above. Based on this, the State does not take issue with Cowles's assertion that she had an actual expectation of privacy and thus meets the first part of the

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[3] 1 Wayne R. LaFave, *Search and Seizure* § 2.7(f), at 659 (3d ed. 1996) (" '[C]overt visual surveillance' of a person while he moves about in public is not subject to fourth amendment restraints.").

[4] 1 LaFave, *supra*, § 2.4(c), at 543.

[5] *City & Borough of Juneau v. Quinto*, 684 P.2d 127, 129 (Alaska 1984) (decided under Article I, Section 22). *Quinto* made it clear that our earlier *Glass* decision did not bar per se all covert participant recording of conversations. Instead, the question in each case is "whether [defendant's] expectation of privacy [under the] circumstances is one which society is willing to recognize as reasonable. *Glass* requires nothing more." *Quinto*, 684 P.2d at 129. The test under the United States Constitution is similar: "*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

test.[6] We will focus therefore on the second part of the test, namely whether Cowles's expectation of privacy was, from a societal perspective, a reasonable one.

This question, in turn, entails "a value judgment . . . whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."[7] The utility of the challenged police conduct must be considered in making this judgment. Whether an expectation of privacy is justified "must . . . be answered by assessing the nature of a particular practice and the

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[6] Although all of Cowles's acts were open to view from the ticket window and open door and by the co-employees who were almost continuously in the office, what is needed under the first prong of the expectation of privacy analysis is an inquiry into the *degree* – rather than the fact (or the mere possibility) – of public exposure. *See* 1 LaFave, *supra*, § 2.1(d), at 389 n. 86 Even if Cowles had expected no privacy from customers or co-workers at ground-level, she could still have had an expectation that her privacy would not be invaded by an "intruding eye from a concealed vantage point" above her. *See State v. McDaniel*, 44 Ohio App.2d 163, 337 N.E.2d 173, 177 (1975). Similarly, although Cowles may have had no general expectation of privacy in her office, she could still have had an "expectation of privacy against being videotaped in it." *See United States v. Taketa*, 923 F.2d 665, 676 (9th Cir.1991). The superior court's factual finding that "Ms. Cowles harbored a subjective belief that her actions in the box office . . . would be private and thus not subject to electronic monitoring," *Cowles*, 961 P.2d at 442-43, is thus not clearly erroneous.

[7] 1 LaFave, *supra*, § 2.1(d), at 393 (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 403 (1974)).

likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement."[8]

We believe that the court of appeals correctly identified the public nature of Cowles's office as the critical factor in answering this question. Cowles's desk could be seen by members of the public through the ticket window and the open door, and by her fellow employees who were walking around the office almost continuously during the videotaping.[9] Activities that are open to public

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[8] *United States v. White*, 401 U.S. 745, 787, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) (Harlan, J., dissenting); *see* 1 LaFave, *supra*, § 2.1(d), at 391-92; *see also American Bar Association Standards for Criminal Justice Electronic Surveillance* (3d ed.) Section B: Technologically Assisted Physical Surveillance, Standard 2-9.1(c) (noting that among the factors relevant to regulating the use of surveillance are (i) law enforcement interests, (ii) the extent to which the surveillance technique invades privacy, (iii) the extent to which the surveillance diminishes or enhances the exercise of First Amendment freedoms and related values, and (iv) the extent to which the surveillance technique is less intrusive than other available effective and efficient alternatives).

[9] The court of appeals stated:

> Cowles was videotaped in a place where, according to Judge Beistline's findings, her activities "could have been readily observed in great detail by any member of the public who happened to visit the office or ticket window." In addition, her activities were open to view by fellow employees. Judge Beistline observed that there was "an almost continuous flow of traffic about her desk." We therefore believe that the open

observation are not generally protected by the Fourth Amendment.[10] "What a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection."[11]

In *O'Connor v. Ortega*, the United States Supreme Court ruled that a physician at a state hospital had a reasonable expectation of privacy as to the contents of his private office in the hospital.[12] But the Court was careful to note that the same expectation would not necessarily apply to all government offices, for "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable."[13] The evidence in this case shows that the University box office at the time of the videotaping was so open to fellow employees and to the view of members of the public as to fall within this description.[14]

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and public nature of the place where Cowles worked argues against finding that she had a reasonable expectation of privacy. *Cowles*, 961 P.2d at 444.

[10] *See Bond v. United States*, 529 U.S. 334, 336, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000).

[11] *Katz*, 389 U.S. at 351, 88 S.Ct. 507.

[12] 480 U.S. 709, 718, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987).

[13] *Id.* at 718, 107 S.Ct. 1492 (Plurality opinion of Justice O'Connor). A fifth member of the Court, Justice Scalia, concurred in the result of Justice O'Connor's opinion, and agreed that an office would not be " 'a subject of Fourth Amendment protection' " in "such unusual situations as that in which the office is subject to unrestricted public access, so that it is 'exposed to the public'." *Id.* at 731, 107 S.Ct. 1492, Scalia, J., concurring (quoting *Katz*, 389 U.S. at 351, 88 S.Ct. 507).

[14] *Compare Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174, 180 (1st Cir.1997) ("It is simply implausible to suggest

Given the clear view of Cowles's desk by members of the public and University employees, we do not believe that the fact that the video camera was hidden in a ceiling vent rather than at an eye-level vantage point is of dispositive importance. Just as a person can have a reasonable expectation of privacy from surveillance by one particular *means* (but not another), she can have a reasonable expectation of privacy from surveillance from one particular *vantage point* (but not another).[15] Having closed the door of a glass phone booth, the defendant in *Katz* had a reasonable expectation that he could not be overheard even though he had no reasonable expectation that he could not still be seen.[16] Similarly, a person engaging in illicit conduct in a doorless restroom stall may have a reasonable expectation that she will not be observed from a hidden vantage point above her, even though it would have been unreasonable for her to expect that she would

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that society would recognize as reasonable an employee's expectation of privacy against being viewed while toiling in the Center's open and undifferentiated work area. PRTC did not provide the work station for the appellants' exclusive use, and its physical layout belies any expectation of privacy. Security operators do not occupy private offices or cubicles. They toil instead in a vast, undivided space – a work area so patulous as to render a broadcast expectation of privacy unreasonable.").

[15] *See* 1 LaFave, *supra*, § 2.4(c), at 545.

[16] *See Katz*, 389 U.S. at 352, 88 S.Ct. 507 ("[W]hat [Katz] sought to exclude when he entered the booth was not the intruding eye – it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen.").

not be seen through the doorless opening.[17] Where incriminating conduct occurs in a public area, however, participants in that conduct already risk observation, and so have "no constitutional right . . . to demand that such observation be made only by some person of whose presence they [are] aware."[18] Cowles's activities were observable through the open ticket window and the office door and by co-employees circulating through the office.[19] The fact that the video camera may have been in an especially good position from which to view Cowles's acts of transferring money from the University money pouch to her desk and thence to her purse is not sufficient to create a reasonable expectation of privacy in an open and public setting where no such expectation could reasonably exist.[20]

Nor does the fact that the videotape surveillance was conducted for the purpose of recording illicit conduct violate Cowles's reasonable expectation of privacy. In her two-stage transfer of money from the University money pouch to her purse, Cowles appears to have relied less on an expectation of privacy than on a belief that those who

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[17] *See People v. Triggs*, 8 Cal.3d 884, 106 Cal.Rptr. 408, 506 P.2d 232, 238 n. 7 (1973).

[18] *State v. Jarrell*, 24 N.C.App. 610, 211 S.E.2d 837 (1975).

[19] The door was around a corner from the window. The investigating officer testified that from the two vantage points any member of the public could see everything shown by the camera. *See Cowles*, 961 P.2d at 443.

[20] There is also evidence that videotaping Cowles from above was not needlessly intrusive, as the ticket office's cement walls prevented the police from positioning a camera at eye-level. *See Cowles*, 961 P.2d at 443.

observed her actions did so without suspecting wrongdoing on her part. Members of the public and Cowles's co-employees did not watch Cowles with the purpose of ferreting out misconduct, while that was, of course, the reason for the hidden camera. If a person's activities are open to view by the public, however, the fact that they are actually observed for the purpose of detecting misconduct does not affect the results of a Fourth Amendment analysis.[21] Because Cowles's theft could have been seen from a vantage point generally used by the public, Cowles had no reasonable expectation of privacy from surveillance directed at detecting her malfeasance.[22]

We also agree with the court of appeals that the fact that Cowles was entrusted with handling her employer's cash is a relevant factor bearing on the reasonableness of Cowles's expectation of privacy. When an individual enters into an employment situation with high security

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[21] *See California v. Ciraolo*, 476 U.S. 207, 213-14 n. 2, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); *see also Florida v. Riley*, 488 U.S. 445, 453, 109 S.Ct. 693, 102 L.Ed.2d 835 (O'Connor, J., concurring in judgment) (if person's activities can be observed from vantage point generally used by public, that person cannot reasonably expect privacy from observation of police).

[22] Not only *could* Cowles's theft be seen from a public vantage point, but at least one of her co-workers *had* seen cash coming in from theater shows which she knew was not being deposited, and had reported Cowles to the University for taking money from the receipts for her personal use. *See Cowles*, 961 P.2d at 441. The trial court found that the "almost continuous flow of traffic [co-workers and visitors] about her desk," particularly when she was handling cash in the process of embezzling it, "seriously undermined" "Cowles'[s] privacy assertions." We agree with this conclusion, as did the court of appeals. *See id.* at 443, 444.

requirements, it becomes less reasonable for her to assume that her conduct on the job will be treated as private.[23] As the court of appeals stated:

> A second basis for finding that the video taping was reasonable is that Cowles worked in a fiduciary capacity in an office where members of the public exchanged money for tickets. Money belonging to the University was regularly handled in the office, and was stored in a safe to which Cowles had access. Video surveillance is commonly conducted in stores and commercial offices where money is exchanged, such as areas in banks where tellers work. Thus, the nature of the work performed in Cowles's office argues against finding that she had a reasonable expectation of privacy."[24]

Cowles relies on three cases in which covert video monitoring of activities in the work place was held to violate constitutional rights. The cases are *United States v. Taketa*,[25] *State v. Bonnell*,[26] and *State v. Thomas*.[27] We believe that only *Thomas* supports her position that the

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[23] *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) ("[I]t is plain that certain forms of public employment may diminish privacy expectations even with respect to . . . personal searches. Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day."); 3 LaFave, *supra*, § 8.6(d), at 823 n. 86.

[24] *Cowles*, 961 P.2d at 444.

[25] 923 F.2d 665 (9th Cir.1991).

[26] 75 Haw. 124, 856 P.2d 1265 (1993).

[27] 642 N.E.2d 240 (Ind.App.1994).

covert monitoring in the present case was constitutionally forbidden, and we disagree with the reasoning of the *Thomas* court. By contrast, *Taketa* and *Bonnell* are not only distinguishable but suggest that the surveillance that took place here was permissible.

In *Taketa*, a covert video camera was placed in the ceiling of a private office reserved for defendant O'Brien's use. The Ninth Circuit found that both O'Brien and his co-defendant, Taketa, had a reasonable expectation of privacy in the office. As to O'Brien, the court noted: "We find a privacy interest in an office reserved for one's exclusive use at a place of employment to be reasonable, especially when asserted against a forcible entry after work hours."[28] In reaching this conclusion the court acknowledged that even the private office of a government worker would not be protected by a reasonable expectation of privacy if the office were "so open to fellow employees or the public that no expectation of privacy is reasonable."[29] But the court noted that the office in question was not open to the public and that only three people had regular access to it.[30] Further, each of the three was named as a co-conspirator in the criminal conduct charged.[31]

The Ninth Circuit also found Taketa to have a reasonable expectation of privacy in O'Brien's office. Taketa was

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[28] 923 F.2d at 673.

[29] *Id.* at 673 (quoting *O'Connor*, 480 U.S. at 717-18, 107 S.Ct. 1492).

[30] *Id.* at 673.

[31] *Id.* at 668, 669 n. 2.

the special agent in charge of the Drug Enforcement Agency suite in which O'Brien's office was located. In finding that Taketa had a reasonable expectation of privacy when he was videotaped in O'Brien's office, the court first acknowledged the general rule, "Videotaping of suspects in public places, such as banks, does not violate the Fourth Amendment; the police may record what they normally may view with a naked eye."[32] But the court found that the general rule did not apply both because of the private nature of the place[33] where the videotaping took place and the time when it occurred.[34]

By contrast, the University box office was not a private office, but a place from which tickets were sold to the public. It was not for Cowles's exclusive use. It was open to the public at the time of the videotaping. Moreover, numerous University employees, who were in no sense co-conspirators of Cowles, had regular access to it.

State v. Bonnell is also materially distinguishable.[35] The covert video surveillance there was a video camera hidden in a smoke detector in the break room of a post office. The police had received reports that gambling activity was taking place. The covert video surveillance lasted for a full year.

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[32] *Id.* at 677.

[33] *See id.* ("As noted before, the office was not open to the public. Taketa also exercised a certain dominion and control over the premises, at the time of his entry. . . . ").

[34] *See id.* (Taketa was videotaped on a Sunday "at a time when other people would not normally be present.").

[35] 75 Haw. 124, 856 P.2d 1265 (1993).

In holding that the surveillance tape should not have been admitted, the Supreme Court of Hawaii concluded that the defendants had an objectively reasonable expectation of privacy with respect to their activities in the break room. In so concluding the court noted that the

> break room was neither a public place nor subject to public view or hearing. Only postal employees and invited guests were allowed in it. Accordingly, the defendants were in a position to regulate their conduct as a function of present company. Moreover, when seated in the break room, the defendants could see anyone approaching and could avoid being surprised by an untrusted intruder.[36]

Again, this contrasts significantly with the University box office in the present case. The box office was open to public view and was regularly visited by co-employees whom Cowles could not trust not to report any misconduct they might observe.

The third case on which Cowles relies is *State v. Thomas*.[37] The defendant in that case ran a store in a state park under a concession agreement which required him to pay ten percent of gross receipts to the state. Suspecting that the defendant was not using the cash register for all transactions, park officials focused a hidden video camera on the cash register during business hours for four days. The videotape showed incriminating conduct on the defendant's part. The Indiana Court of Appeals upheld the suppression of the tape on the grounds that

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[36] *Id.* at 1276.

[37] 642 N.E.2d 240 (Ind.App.1994).

the defendant had a reasonable expectation of privacy with respect to his activities that were recorded, even though these activities were "openly exposed to members of the public who used the state-owned camp store."[38]

The State argues that *Thomas* is distinguishable on a number of grounds. The defendant was a licensee, not a public employee; under his license agreement he had a possessory right to the store superior to that of the state; and he was actually handling his own money in contrast to Cowles who was entrusted with handling University money. But we do not believe that these differences are necessarily critical. The important point in *Thomas*, as here, is that the videotaped transactions were open and visible to members of the public. But while we disagree with the State that *Thomas* is materially distinguishable from the present case, we do not believe that it was correctly decided. Instead, we agree with the view of the dissenting judge in *Thomas* that, because the transactions in question were openly exposed to members of the public, society should not regard as reasonable any expectation on the part of the defendant that the transactions were private:

> The camera videotaped commercial transactions which members of the public consummated on public land inside a public building. The transactions, by their nature, were public and not private. . . . "What a person knowingly exposes to the public, even in his own home or office, is

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[38] *Id.* at 244.

not a subject of Fourth Amendment protection. . . . "[39]

In summary, we agree with the conclusion of the court of appeals that the covertly recorded videotape of Cowles's activities in the University box office was properly admitted into evidence. For largely the same reasons as those expressed by the court of appeals, we agree with the value judgment that Cowles did not have an expectation of privacy at the time and place in question that society should recognize as reasonable. The covert video monitoring that took place was not, in our judgment, inconsistent with the values of our free society. But this conclusion would not necessarily be the same if the monitoring had not been initiated for a legitimate purpose – the detection of theft – and had not been based on reasonable grounds to believe that Cowles was stealing. Lacking a legitimate purpose, or reasonable cause, the utility of the monitoring would be diminished and a different balance might be struck.

IV. *CONCLUSION*

For the reasons stated, the decision of the court of appeals is AFFIRMED.

FABE, Justice, with whom BRYNER, Justice, joins, dissenting.

According to the court's decision today, the government may use hidden cameras to monitor workers without obtaining a search warrant, so long as the workers do not have private offices. This decision permits deeply

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[39] *Id.* at 248 (quoting *Katz*, 389 U.S. at 351, 88 S.Ct. 507).

intrusive police surveillance of individuals who have – and deserve – every reasonable expectation of privacy. Although the Alaska Constitution's search and seizure protection is "broader in scope than that guaranteed in the federal Constitution,"[1] the court's decision defines Alaskans' constitutional protections more narrowly than has any decision of the United States Supreme Court. In so doing, it disregards ample state and federal precedent supporting the conclusions that workers should expect privacy from surreptitious police surveillance regardless of the nature of their work space; that police violate reasonable expectations of privacy by engaging in more intrusive searches than a defendant would expect from a member of the public; and that secret overhead video observation is a uniquely intrusive mode of search, thus requiring a warrant. The court also fails to support its unprecedented assertion that a defendant who works with cash has a legally diminished expectation of privacy. Because I cannot agree with the court's departure from established Alaska and federal law, I respectfully dissent.

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[1] *Woods & Rohde, Inc. v. State, Dep't of Labor* 565 P.2d 138, 150 (Alaska 1977) (extending search and seizure protection to commercial property); *see also Reeves v. State*, 599 P.2d 727 (Alaska 1979) (expanding limits on preincarceration searches); *Jackson v. State*, 791 P.2d 1023 (Alaska App.1990) (limiting pat-down searches and rejecting the bright-line rule adopted by the U.S. Supreme Court in *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)).

I. *THE ALASKA CONSTITUTION PROTECTS INDIVIDUALS FROM SURREPTITIOUS POLICE VIDEO SURVEILLANCE.*

The "primary purpose" of Alaska's constitutional guarantee against unreasonable searches and seizures[2] is "the protection of personal privacy and dignity against unwarranted intrusion by the State."[3] Because of this protection, law enforcement officials may not intrude upon individual privacy without a warrant. The warrant requirement is a weighty one. As Chief Justice Jay Rabinowitz wrote in *Smith v. State*,[4] "[i]n my judgment, it is preferable to entrust the decision to invade citizens' privacy to the scrutiny of neutral judicial officials rather than police officers – even police officers operating under great self-restraint." Quoting the U.S. Supreme Court's opinion in *McDonald v. United States*,[5] Chief Justice Rabinowitz continued:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too

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[2] *See* Alaska Const. art. 1, § 14.

[3] *Woods & Rohde*, 565 P.2d at 148 (internal quotations omitted).

[4] 510 P.2d 793, 800 (Alaska 1973).

[5] 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

> precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.[6]

In *State v. Glass*, we held that warrantless electronic audio monitoring violated the state constitution.[7] In so holding, we expressed grave concerns about electronic surveillance technologies and their effect on "the right of persons to determine for themselves when, how, and to what extent information about them is communicated to others."[8] The court's decision today is at odds with both

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[6] *Smith v. State*, 510 P.2d 793, 800 (Alaska 1973) (Rabinowitz, J., dissenting) (quoting *McDonald*, 335 U.S. at 455-56, 69 S.Ct. 191); *see also Woods & Rohde*, 565 P.2d at 149 ("The conclusion that the imposition is reasonable should not be drawn by the very persons who are the agency for the deprivation of rights.") (quoting *Keller v. State*, 543 P.2d 1211, 1219 (Alaska 1975)).

[7] 583 P.2d 872 (Alaska 1978). In *Glass*, we cited with approval a Montana case holding that, under Montana's state constitutional privacy provision, defendants reasonably expected privacy from audio broadcast of their conversation, despite the fact that they were in a public parking lot. *Id.* at 878 (*citing State v. Brackman*, 178 Mont. 105, 582 P.2d 1216 (1978)), *overruled by State v. Brown*, 232 Mont. 1, 755 P.2d 1364 (1988). More recent Montana cases have found broad protection from warrantless technologically aided surveillance under the state constitution. In *State v. Solis*, 214 Mont. 310, 693 P.2d 518 (1984), the Montana Supreme Court excluded from evidence videotapes of defendant's conversation with an undercover officer, and in *State v. Siegal* it found that warrantless thermo-imaging of an indoor marijuana-growing operation constituted an unreasonable search. 281 Mont. 250, 934 P.2d 176 (1997), *overruled on other grounds by State v. Kuneff*, 291 Mont. 474, 970 P.2d 556 (1998).

[8] *Glass*, 583 P.2d at 880 (quoting Alan F. Westin, *Privacy and Freedom* 7 (1967)).

the logic and language of *Glass*. The *Glass* opinion emphasized "the high value placed on speech by our society,"[9] but it did not thereby abandon our constitutionally mandated concern for "the protection of personal privacy and dignity against unwarranted intrusion by the State."[10] In fact, the *Glass* opinion built on this very concern: It spoke of "[t]he corrosive impact of warrantless . . . monitoring on our sense of security"[11] and twice defined the right at issue in the case as the "right to be let alone."[12]

Our opinion in *Glass* even intimated that *Glass*'s specific holding should apply to video as well as audio surveillance. We suggested that Alaska's constitutional privacy provision may have been enacted "out of a concern to protect against extensive governmental use of

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[9] *State v. Page*, 932 P.2d 1297, 1297 (Alaska 1997) (Matthews, J., dissenting) (arguing that a concern for free speech was the central rationale in *Glass*). Video surveillance, too, threatens activities protected by the First Amendment, including assembly, writing, and symbolic speech. *See* U.S. Const. amend. I (protecting freedom of speech, freedom of the press, and the right to peaceable assembly); *see also Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (First Amendment protects right to wear black armbands to school to protest Vietnam conflict); *Johnson v. Tait*, 774 P.2d 185, 186 n. 3 (Alaska 1989) (Hell's Angels emblem is protected symbolic speech). The concern for freedom of expression in *Glass* is therefore applicable to this case, as well.

[10] *Woods & Rohde, Inc. v. State, Dep't of Labor* 565 P.2d 138, 148 (Alaska 1977) (extending search and seizure protection to commercial property) (internal quotations omitted).

[11] 583 P.2d at 877 (quoting *Holmes v. Burr*, 486 F.2d 55, 65 (9th Cir.1973) (Hufstedler, J., dissenting)).

[12] *Id.* at 876, 880.

electronic surveillance techniques."[13] We also mentioned with approval *Dietemann v. Time, Inc.*, a common-law privacy case involving both surreptitious photography and audio recording;[14] the analysis in that case almost exclusively concerned visual images and "electronic devices with their capacity to . . . intrude upon [an individual's] most intimate activities, and expose his most personal characteristics to the public gaze."[15]

Warrantless secret electronic surveillance by law enforcement agents violates deeply held and constitutionally protected values. As we recognized in *Glass*, "we exclude the evidence [gathered by unconstitutional means] because the transcendent values preserved by constitutional guarantee are of greater societal moment than the use of that evidence to obtain a conviction."[16] These values remain paramount regardless of the facts of the case or the character of the defendant. As Justice

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[13] *Id.* at 879 (*quoting State v. Roy*, 54 Haw. 513, 510 P.2d 1066, 1069 (1973)).

[14] *Id.* at 880-81.

[15] 449 F.2d 245, 248 (9th Cir.1971) (quoting *Briscoe v. Reader's Digest Ass'n*, 4 Cal.3d 529, 93 Cal.Rptr. 866, 483 P.2d 34, 37 (1971)). *See also United States v. Torres*, 751 F.2d 875 (7th Cir.1984). In that case, Judge Posner observed:

> [S]ecretly televising people (or taking still or moving pictures of them) while they are in what they think is a private place is an even greater intrusion on privacy than secretly recording their conversations.

Id. at 878.

[16] *Glass*, 583 P.2d at 878 (explaining why "more reliable" evidence of a conversation is not necessarily admissible for that reason alone).

Frankfurter explained, "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment."[17] Following those "great themes," our own precedent, and that of the U.S. Supreme Court, the government violated Lindalee Cowles's rights by subjecting her to surreptitious and warrantless video surveillance in the workplace.

II. *THE PRESENCE OF COWORKERS IN COWLES'S WORKPLACE CLEARLY DOES NOT DEFEAT HER REASONABLE EXPECTATION OF PRIVACY.*

State and federal search and seizure provisions protect people, not places.[18] We have recognized that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[19] This right does not depend on an individual's

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[17] *United States v. Rabinowitz*, 339 U.S. 56, 69, 70 S.Ct. 430, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting), *overruled by Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), *quoted in McCoy v. State*, 491 P.2d 127, 139 (Alaska 1971) (Rabinowitz, J., concurring in part and dissenting in part).

[18] *See Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

[19] *State v. Glass*, 583 P.2d 872, 875 (Alaska 1978) (quoting *Katz*, 389 U.S. at 359, 88 S.Ct. 507). *Glass* implies that protection from search and seizure in general, and electronic surveillance in particular, extends to people in purely public locations. In holding the in-house audio surveillance in that case

physical location or on her status in the workplace. The court, however, concludes that constitutional protection depends on whether an individual shares her work space, holding that "the public nature of Cowles' office [is] the critical factor" in denying her Fourth Amendment protection.[20] This holding runs afoul of clear U.S. Supreme Court precedent and insupportably discriminates between citizens based on their workplace status.

The court suggests that the U.S. Supreme Court's decision in *Katz v. United States*[21] limits search and seizure protection to private locations.[22] But *Katz* created no such limitation – to the contrary it stated:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected.[23]

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unconstitutional, we cited with approval a Montana case holding that, under Montana's state constitutional privacy provision, defendants reasonably expected privacy from audio broadcast of their conversation, despite the fact that they were in a public parking lot. *See id.* at 878 (citing *State v. Brackman*, 178 Mont. 105, 582 P.2d 1216 (1978)). *See also State v. Bonnell*, 75 Haw. 124, 856 P.2d 1265, 1275 (1993) ("a person has a 'halo' of privacy wherever he goes and can invoke a protectable right to privacy wherever he may legitimately be and reasonably expect freedom from governmental intrusion").

[20] Op. at 1171.

[21] 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

[22] *See* Op. at 1171-1172.

[23] *Id.* at 351, 88 S.Ct. 507 (emphasis added) (citations omitted).

The *Katz* standard does not support this court's holding. Rather, it supports a conclusion that, regardless of her location, an individual who seeks and reasonably expects privacy is protected by the Fourth Amendment. As subsequent cases applying *Katz* make clear, an individual such as Cowles can reasonably expect privacy in her workplace.

The U.S. Supreme Court applied the *Katz* standard to the workplace in *O'Connor v. Ortega*.[24] A majority of that Court found that a defendant can reasonably expect privacy in her office, even if that office is open to other people.[25] In today's decision, this court quotes *O'Connor*'s plurality opinion as legal authority.[26] But the quoted language[27] is not *O'Connor*'s holding; in fact, it conflicts with the only holding for which *O'Connor* legally stands: the narrow rule endorsed by Justice Antonin Scalia as the concurring fifth vote.[28] Justice Scalia's concurrence

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[24] 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987).

[25] *See id.* In *Mancusi v. DeForte*, 392 U.S. 364, 368-69, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968), the court established that a defendant who shared a single large office with several coworkers had a reasonable expectation of privacy that was defeated by a police search of the office.

[26] *See* Op. at 1171.

[27] "[S]ome government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable." *O'Connor*, 480 U.S. at 718, 107 S.Ct. 1492 (plurality opinion).

[28] "When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193,

expressly disputed the plurality standard quoted by this court's majority. He wrote that the standard "must be wrong if it leads to the conclusion on the present facts that if Hospital officials had extensive work-related reasons to enter Dr. Ortega's office no Fourth Amendment protection existed. It is privacy that is protected by the Fourth Amendment, not solitude."[29] To illustrate the reach of the Fourth Amendment, Justice Scalia described a hypothetical defendant very much like Lindalee Cowles: "[T]he secretary working . . . in an office frequently entered by . . . other employees is protected against unreasonable searches of that office by the government."[30] Justice Scalia supported his position by reference to *Mancusi v. DeForte*, a case holding that the Fourth Amendment protected a defendant in an office shared with coworkers.[31] Justice Scalia's narrow rule – the rule for which *O'Connor* stands – is that government employees lose Fourth Amendment protection only in "such unusual situations as that in which the office is

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97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). *See also Feliciano v. City of Cleveland*, 661 F.Supp. 578, 587 (N.D.Ohio 1987) (noting that only those aspects of *O'Connor* in which Scalia joined the plurality have "the weight of a decision of the Court"), *abrogated on other grounds by National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).

[29] *O'Connor*, 480 U.S. at 730, 107 S.Ct. 1492 (Scalia, J., concurring in judgment) (internal quotations and citations omitted).

[30] *Id.*

[31] 392 U.S. at 368-69, 88 S.Ct. 2120.

subject to *unrestricted public access*."[32] Following this U.S. Supreme Court interpretation of the Federal Constitution, the presence of Cowles's coworkers did not defeat her privacy expectation.[33]

The legally binding rule from *O'Connor*, then, is that government workers enjoy a reasonable expectation of privacy in the office regardless of the presence of co-workers; their expectation remains reasonable unless the public has unrestricted access to the office.[34] The public clearly did- not have unrestricted access to Cowles's office. Her office was an enclosed space, and public access was restricted by a door with a combination lock. The record does not suggest that members of the public ever physically entered the space; rather, public access was limited to a view from the box-office window.[35] Under both *Katz* and *O'Connor*, Cowles's privacy at her desk is protected by the Fourth Amendment.[36]

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[32] 480 U.S. at 731, 107 S.Ct. 1492 (emphasis added).

[33] The leading treatise on Fourth Amendment law reinforces this analysis, pointing out that "[i]t is very important to recognize that a majority of the [U.S. Supreme Court] subscribes to a somewhat broader notion of a public employee's justified privacy expectations in the workplace [than that expressed by the plurality]." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.3(d), at 482 (3d ed.1996).

[34] *See O'Connor*, 480 U.S. at 718, 107 S.Ct. 1492.

[35] As discussed below, the partial visibility of Cowles's desk from the public area outside the box office does not defeat her reasonable expectation of privacy from the type of surveillance employed in this case.

[36] The court cites without discussion *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174 (1st Cir.1997). Op. at 1172

This court's conclusion that only inhabitants of private offices are protected from warrantless surveillance is particularly disturbing because it effectively ties a defendant's constitutional rights to her economic status. Following the standard articulated today, executives in private offices will be protected, but clerical workers in shared work spaces will not. This rule will disproportionately affect women, who represent 99% of secretaries, 96% of receptionists, 91% of bookkeepers, and 77% of cashiers.[37] The impact of this rule is still greater for African-American women, who are more likely to work in administrative support or service positions than in any other jobs.[38] The court offers no principled reason why constitutional protection of privacy, which we have defined as "the individual's interest in preserving his essential dignity as a human being,"[39] should depend upon an individual's status in the workplace.

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n. 14. Interestingly, the *Vega-Rodriguez* holding depended on the fact that the surveillance was *disclosed* – "the affected workers were on clear notice from the outset" of the video surveillance. *Id.* at 180. The court "caution[ed], however, that cases involving the covert use of clandestine cameras, or cases involving electronically-assisted eavesdropping, may be quite another story." *Id.* at 180 n. 5.

[37] Women's Bureau, U.S. Dep't of Labor, Twenty Leading Occupations of Employed Women (1999) (March 14, 2001) <http://www.dol.gov/dol/wb/public/wb-pubs/20lead99.htm>.

[38] Women's Bureau, U.S. Dep't of Labor, No. 97-1, Facts on Working Women, Black Women in the Labor Force (1997).

[39] *Glass*, 583 P.2d at 880 (quoting Alan F. Westin, *Privacy and Freedom* 7 (1967)).

Chief Justice Rabinowitz raised a nearly identical objection in his dissent from *Smith v. State*.[40] The court held that individuals who disposed of trash in a common dumpster could not reasonably expect that the police would not search their garbage.[41] But Chief Justice Rabinowitz disagreed with the majority's holding "insofar as it discriminates between the right to privacy of citizens occupying a single family dwelling, and those living in multiple unit dwelling places."[42] He explained:

> In my opinion, such a distinction is unjustifiable as being either arbitrary or ultimately grounded upon impermissible economic discrimination. . . . Nowhere in the text of the fourth amendment, article I, section 14 or article I, section 22 is the proviso, "for property owners only." . . . To make the protection of the fourth amendment, article I, section 14 or article I, section 22 depend upon the economic status of an individual . . . is, in my opinion, unacceptable. The appropriate analytical focal point should be appellant's reasonable expectation of privacy. In my view, such expectation will remain constant, regardless of whether appellant's living unit is situated by itself on a spacious multi-acre estate or stacked upon others in a . . . crowded tenement in the inner city.[43]

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[40] 510 P.2d 793 (Alaska 1973). The New Jersey Supreme Court cited Chief Justice Rabinowitz's dissent in its holding that curbside trash searches violate the New Jersey Constitution. *See State v. Hempele*, 120 N.J. 182, 576 A.2d 793, 805 (1990).

[41] *See Smith*, 510 P.2d at 798.

[42] 510 P.2d at 805 (Rabinowitz, C.J., dissenting).

[43] *Id.*

The individual's reasonable expectation of privacy from police video surveillance should similarly remain constant whether she works in a private office or a crowded common space. "It is privacy that is protected by the Fourth Amendment [and article I, sections 14 and 22 of the Alaska Constitution], not solitude."[44] The court gravely errs by recognizing constitutional protection for executives in private offices but denying it to secretaries in typing pools.

III. *THE PARTIAL VISIBILITY OF COWLES'S WORKPLACE THROUGH A BOX OFFICE WINDOW CLEARLY DOES NOT DEFEAT HER REASONABLE EXPECTATION OF PRIVACY FROM OVERHEAD VIDEO SURVEILLANCE.*

Cowles's desk was partially visible to the public through a customer service window.[45] Based on this fact,

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[44] *O'Connor*, 480 U.S. at 730, 107 S.Ct. 1492 (Scalia, J., concurring).

[45] The court below found that Cowles's incriminating activities were visible to the public. *Cowles v. State*, 961 P.2d 438, 443 (Alaska App.1998). But the record indicates that the detail captured by the camera surpassed that which any member of the public could have seen. This intrusive focus is relevant to Fourth Amendment analysis even if the public's less-intrusive gaze would also have discerned the incriminating acts. *See United States v. Taketa*, 923 F.2d 665, 677 (9th Cir.1991) (treating intrusiveness against personal dignity as reason for finding search unreasonable in video surveillance case); *State v. Bonnell*, 75 Haw. 124, 856 P.2d 1265, 1277 (1993) (same).

A police witness testified that Cowles's desk was 12-13 feet from the window and her desktop was partially obscured from view. He indicated that a member of the public could not see

the court concludes that Cowles had no reasonable expectation of privacy from ceiling-mounted video surveillance by the police. This conclusion is at odds with our own precedent and with that of other state and federal courts. Because video surveillance is particularly intrusive, and because it far exceeds the reasonable expectations of people in all but the most public locations, numerous courts agree that warrantless police surveillance violates defendants' rights.

A. *Police May Not, Without a Warrant, Use Means of Surveillance More Intrusive than Those Which a Defendant Reasonably Expects from Public Observers.*

Even in an area completely open to the public – which Cowles's office was not – citizens are protected from intrusive, warrantless searches. Again, the standard is the defendant's reasonable expectation of privacy.[46] Where the defendant should reasonably expect public observation, the government may engage in observation of that sort. But the presence of public observers does not give the government unlimited license to pursue more intrusive modes of surveillance. The U.S. Supreme Court has repeatedly articulated this standard. Thus, in *Katz*, a

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everything recorded by the camera without simultaneously looking through both the box office window and the door around the corner from the window. The record does not reflect whether the door and window were open when the surveillance was conducted, although they were typically open during business hours.

[46] *See City and Borough of Juneau v. Quinto*, 684 P.2d 127, 129 (Alaska 1984).

defendant inside a glass phone booth could reasonably expect to be seen, but not heard.[47] Similarly, a merchant who invites the public to view his goods is constitutionally protected from police using more intrusive techniques for "seeing them as a customer would [not] ordinarily see them."[48] In its most recent term, the Court reaffirmed this principle, holding that a bus passenger who knew that other passengers or bus employees might handle his soft-sided luggage nevertheless reasonably expected privacy from a law enforcement agent "feel[ing] the bag in an exploratory manner."[49] These rulings reflect a single consistent rule: citizens may reasonably expect privacy from intrusive modes of government observation, even if they expect members of the public to engage in less intrusive observation.

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[47] *See Katz v. United States*, 389 U.S. 347, 352, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

[48] *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979) (where town justice issuing warrant did not pay for films he viewed and removed wrappers from print material, he "was not seeing them as a customer would ordinarily see them," and therefore violated the Fourth Amendment); *see also Maryland v. Macon*, 472 U.S. 463, 470, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985) (in vice investigations, "[a] government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant") (quoting *Lewis v. United States*, 385 U.S. 206, 211, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966)).

[49] *Bond v. United States*, 529 U.S. 334, 339, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000).

B. *Secret Overhead Video Surveillance Is a More Intrusive Mode of Observation than Cowles Could Reasonably Have Expected from the Public or Her Coworkers.*

Courts have recognized two related but distinct ways in which secret video surveillance uniquely intrudes on privacy. First, police monitoring by hidden cameras poses a special threat to personal dignity, security, and privacy. Second, hidden cameras may violate reasonable expectations of privacy as a practical matter, because an individual does not reasonably expect sustained observation from a vantage point where no human would reasonably be. Courts have drawn on both conceptions of defendants' reasonable expectation of privacy to conclude that hidden video surveillance by police violates constitutional rights.

1. *Secret police video surveillance is uniquely offensive to individual dignity and privacy.*

Video surveillance is a far more intrusive mode of observation than Cowles could reasonably have expected from her coworkers or the public. Our own opinion in *Glass* recognized that warrantless electronic surveillance has a "corrosive impact . . . on our sense of security."[50] In cases involving video surveillance, courts have found it "unarguable that television surveillance is exceedingly intrusive . . . and inherently indiscriminate, and that it could be grossly abused – to eliminate personal privacy

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[50] *Glass*, 583 P.2d at 877 (quoting *Holmes v. Burr*, 486 F.2d 55, 66 (9th Cir.1973) (Hufstedler, J., dissenting)).

as understood in modern Western nations."[51] In the recent words of the Court of Appeals for the Ninth Circuit, "[h]idden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement."[52] The court quoted Judge Kozinski's statement that "every court considering the issue has noted [that] video surveillance can result in extraordinarily serious intrusions into personal privacy. . . . If such intrusions are ever permissible, they must be justified by an extraordinary showing of need."[53] Surreptitious video recording is clearly more intrusive than the ordinary public gaze which a defendant in Cowles's position might

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[51] *State v. Bonnell*, 75 Haw. 124, 856 P.2d 1265, 1277 (1993) (quoting *United States v. Torres*, 751 F.2d 875, 882 (7th Cir.1984); *see also United States v. Cuevas-Sanchez*, 821 F.2d 248, 252 (5th Cir.1987) (adopting constitutional standards governing valid warrants for video surveillance)); *State v. Thomas*, 642 N.E.2d 240, 245 (Ind.App.1994) (Department of Natural Resources's right to inspect concessionaire's premises did not confer right to install hidden video surveillance).

[52] *United States v. Nerber*, 222 F.3d 597, 603 (9th Cir.2000).

[53] *Id.* (quoting *United States v. Koyomejian*, 970 F.2d 536, 551 (9th Cir.1992) (Kozinski, J., concurring) (alterations in original)). *See also* George Orwell's description of video surveillance from *1984*.

> The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment.

George Orwell, *1984* 4 (1949) (quoted in *Cuevas-Sanchez*, 821 F.2d at 251 n. 3).

expect. As such, it is beyond the range of activities in which law enforcement agents may, without a warrant, engage.

2. *Secret overhead video surveillance violates defendants' reasonable expectations of privacy because it gives police information that defendants do not reasonably expect to expose to public observers.*

Surreptitious overhead video surveillance by police violated Cowles's reasonable expectation of privacy because it exceeded her reasonably expected public observation in its duration, proximity, focus, and vantage point. Cases involving aerial observation of defendants' property confirm that a defendant may expect the public gaze without reasonably expecting the unblinking lens of a video camera close overhead.

Two U.S. Supreme Court cases, *California v. Ciraolo*[54] and *Florida v. Riley*,[55] hold that defendants should reasonably expect overflight observation by law enforcement officers in airplanes or helicopters, *because it is routine for members of the public to see the same view* during air travel.[56] But it was not routine or even possible for members of the public to view Cowles's desk as did the police

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[54] 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

[55] 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989).

[56] *See id.* at 450-51, 109 S.Ct. 693 (plurality holding, four votes) and 452-55 (O'Connor, J., concurring); *Ciraolo*, 476 U.S. at 213-14, 106 S.Ct. 1809; *see also Katz*, 389 U.S. at 359, 88 S.Ct. 507 (a defendant loses Fourth Amendment protection only for activities he "knowingly exposes to the public. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.") (citation omitted).

investigators through their video camera. The public did not have access to the box-office ceiling. The record suggests that members of the public looking in the window may not even have been able to see past piles of paper on the desk to observe all of the incriminating activities captured on tape, including desktop activities such as Cowles's writing on the cash deposit receipt.

Even if intermittent public observation from the ceiling vantage point were possible, case law applying *Ciraolo* indicates that warrantless overhead *video* surveillance would still violate the Fourth Amendment. In *United States v. Cuevas-Sanchez*, the Court of Appeals for the Fifth Circuit faced this question: "*Ciraolo* teaches us that a flyover by a plane at 1,000 feet does not intrude upon the daily existence of most people; we must now determine whether a camera monitoring all of a person's backyard activity does ."[57] The court of appeals opined that *Ciraolo* does not "authorize [ ] any type of surveillance whatever just because one type of minimally-intrusive aerial observation is possible."[58] It concluded that government agents could not engage in warrantless video surveillance

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Thus, exposing an activity to the sky or ceiling overhead constitutes knowing exposure to the public only if the public can reasonably be expected to occupy that vantage point.

[57] 821 F.2d 248, 251 (5th Cir.1987) (holding that video surveillance was a search for Fourth Amendment purposes, but that the warrant obtained by police was valid). In *Florida v. Riley*, the court approved closer observation from only 400 feet, but as in *Ciraolo*, the ruling depended on the fact that a member of the public could see the same view. *See Riley*, 488 U.S. at 449-50, 109 S.Ct. 693.

[58] 821 F.2d at 251.

because this "potentially indiscriminate and most intrusive method of surveillance" was not comparable to the routine public observations discussed in *Ciraolo*.[59]

A California court, applying federal constitutional law, arrived at similar governing principles without specifically addressing video surveillance in *People v. Romo*.[60] The court indicated that, under *Ciraolo*, a defendant's reasonable expectation of privacy might be violated by law enforcement agents hovering over her property or using electronic aids to observation.[61] The reasonableness of overflight observation, the court stated, depends in part on the duration and altitude of the observation.[62] Following this standard, sustained observation from close overhead is more likely to violate the Fourth Amendment than would the passing observation of a law enforcement officer in an aircraft. In this case, the government observed Cowles from a non-public vantage point immediately over her head for a period of hours, and it used uniquely intrusive surveillance technology to do so. This action was a search; in the absence of a warrant, it was unconstitutional.

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[59] *Id.* at 250-51.

[60] 198 Cal.App.3d 581, 243 Cal.Rptr. 801 (1988) (holding that overflight observation was not a search because the aircraft had a right to occupy its public vantage point, and the flight was neither unreasonable nor intrusive).

[61] *See id.* at 805.

[62] *See id.*

IV. *PERSUASIVE FEDERAL AND STATE AUTHORITY HOLDS THAT WORKERS IN SEMI-PUBLIC WORKPLACES HAVE A REASONABLE EXPECTATION OF PRIVACY FROM SECRET GOVERNMENT VIDEO SURVEILLANCE.*

In both *State v. Thomas*[63] and *United States v. Taketa*,[64] courts concluded that warrantless video surveillance in the workplace violated workers' reasonable expectations of privacy, despite the fact that the workers did not have private offices. And in *State v. Bonnell*, the Hawaii Supreme Court explicitly relied on the "exceedingly intrusive" nature of video surveillance in concluding that a hidden camera in an employee breakroom violated workers' reasonable expectations of privacy.[65] The majority recognizes the significance of *Thomas* in its opinion, but misconstrues both *Taketa* and *Bonnell*. All three cases apply the clear legal principles outlined above to conclude that surveillance of the sort used in this case is unconstitutional.

In *Thomas*, state officials installed a video camera above the cash register of a park concession store and recorded the clerk's cash transactions.[66] The Indiana Court of Appeals applied both state and federal search and seizure law to conclude that the clerk reasonably expected privacy, and therefore the tape was inadmissible.[67] In so doing, it recognized all of the points of law

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[63] 642 N.E.2d 240 (Ind.App.1994).

[64] 923 F.2d 665 (9th Cir.1991).

[65] 75 Haw. 124, 856 P.2d 1265, 1277 (1993).

[66] 642 N.E.2d at 242.

[67] *See id.* at 247.

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discussed above: workers do not lose their expectation of privacy even in a publicly accessible workplace,[68] video is a uniquely intrusive mode of surveillance,[69] and prolonged observation from an overhead vantage point is "grossly intrusive."[70]

The Court of Appeals for the Ninth Circuit reached a similar conclusion in *Taketa*.[71] In that case, federal agents installed a hidden video camera in the ceiling of defendant Thomas O'Brien's office.[72] The camera recorded incriminating footage of both O'Brien and a coworker, David Taketa. The *Taketa* court concluded that the surveillance violated the Fourth Amendment rights of both men.[73]

As the majority characterizes *Taketa*, the *Taketa* court found Taketa's expectation of privacy reasonable only "because of the private nature of the place where the videotaping took place and the time when it occurred."[74] But *Taketa* plainly does not support this reading; the *Taketa* court explicitly and repeatedly named as the primary bases for its decision two factors discussed at length in this dissent: the intrusive nature of video surveillance and the personal locus of privacy rights, even in non-private places. The *Taketa* court cited *Katz* for the

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[68] *See id.* at 244-45.

[69] *See id.* at 245.

[70] *Id.* at 245.

[71] 923 F.2d 665 (9th Cir.1991).

[72] *See id.* at 669.

[73] *See id.* at 678.

[74] Op. at 1174.

principle that "the Fourth Amendment protects people not places";[75] then "base[d its] holding expressly upon *Katz*, and upon [the court's] recognition of the exceptional intrusiveness of video surveillance."[76] This court's majority apparently ignores this unambiguous language in its discussion of *Taketa*.[77]

In analyzing Taketa's right to freedom from secret video surveillance, the *Taketa* court emphasized that its decision was based on Taketa's personal privacy rights, and not merely on location-based privacy.[78] It noted that "persons may create temporary zones of privacy within which they may not reasonably be videotaped . . . even when that zone is a place they do not own or normally control, and in which they might not be able reasonably to challenge a search at some other time or by some other means."[79] This individually rooted right was violated, the *Taketa* court held, both because the "silent, unblinking lens of the camera was intrusive" as no human search of the office could have been, and because the "video search was directed straight at [Taketa]."[80] These factors are identical in the case now before us.

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[75] *Id.* at 676 (quoting *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

[76] *Id.* at 677.

[77] Two cases which draw on *Taketa* support the discussion above and conflict with the majority's interpretation. *See United States v. Nerber*, 222 F.3d 597, 602 (9th Cir.2000); *State v. Bonnell*, 75 Haw. 124, 856 P.2d 1265, 1266-67 (1993).

[78] 923 F.2d at 677.

[79] *Id.* at 677.

[80] *Id.* at 677.

Yet a third case excluding video evidence like that at issue today, *State v. Bonnell*, explicitly relied on the "exceedingly intrusive" nature of video surveillance and the defendants' personal, non-location-based privacy rights as bases for the ruling.[81] The Hawaii Supreme Court in *Bonnell* also relied on the non-public nature of the surveilled space – an employee breakroom – as an element of its decision.[82] But, like the Ninth Circuit in *Taketa*, it strongly emphasized personal privacy rights: "A person has a 'halo' of privacy wherever he goes and can invoke a protectable right to privacy wherever he may legitimately be."[83] And it discussed in no uncertain terms the suspicion with which the court viewed video surveillance, concluding that such surveillance is more intrusive than audio taping and that this intrusiveness was an essential factor for Fourth Amendment analysis.[84] The court explicitly grounded its decision in "the same factors as those considered by the *Taketa* court."[85] The court also implied that because of the individual privacy right at stake, the outcome of the case might have been the same even if the defendants were not in a private room. "Whatever the general privacy interest the defendants may or may not have had in the break room," the court wrote, "they had an actual and objectively reasonable expectation of privacy against being taped in it."[86]

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[81] 75 Haw. 124, 856 P.2d 1265, 1276-77 (1993).

[82] *See id.* at 1275.

[83] *Id.* (quotation omitted).

[84] *See id.* at 1277.

[85] *Id.*

[86] *Id.* (internal quotations omitted).

Thomas, Taketa, and *Bonnell* all squarely support Cowles's claim that police surveillance by hidden camera violated her rights against unreasonable search and seizure. All three cases apply the straightforward legal standards established by the U.S. Supreme Court. Because the court today offers scant authority for the opposite conclusion, I cannot agree with its holding.

V. *NO AUTHORITY SUPPORTS THE COURT'S ASSERTION THAT COWLES'S RESPONSIBILITY FOR HANDLING CASH SHOULD HAVE DIMINISHED HER EXPECTATION OF PRIVACY.*

The court states that "the fact that Cowles was entrusted with handling her employer's cash is a relevant factor bearing on the reasonableness of Cowles's expectation of privacy."[87] While this factor may certainly be relevant to the legal analysis of surveillance conducted by employers, it is not relevant when surveillance is carried out by police. Although the majority offers two legal authorities for its position, neither supports the court's assertion that workplace responsibility for cash should increase an employee's expectation of police surveillance.

First, the court cites *National Treasury Employees Union v. Von Raab,* a case holding that drug testing of U.S. Customs Service employees is reasonable.[88] *Von Raab* states in dicta that operational realities of the workplace can render reasonable requirements that would elsewhere

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[87] Op. at 1173.

[88] 489 U.S. 656, 677, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989); *see* Op. at 1173 n. 23.

be unreasonable – such as physical fitness requirements in the military or daily personal searches for U.S. Mint workers.[89] But "these operational realities will rarely affect an employee's expectations of privacy."[90] *Von Raab* nowhere states or even implies the sweepingly broad rule that anyone who works with cash has a diminished expectation of privacy; it certainly does not support today's specific ruling that police may surreptitiously, and without a warrant videotape anyone who handles an employer's cash.

Second, the court relies on a footnote from Professor LaFave's treatise,[91] discussing *United States v. Donato*.[92] In that case, however, a federal district court upheld the search of a federal mint employee's locker only because federal regulations permitted the search.[93] No case law or other authority supports the novel proposition that an employee's fiduciary duty should reduce her reasonable expectation of privacy from police surveillance at her desk; the court's adoption of this rule is unprecedented and groundless.

VI. *CONCLUSION*

Under *Katz* and *O'Connor*, people who work in shared quarters or who work with the public still have

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[89] *See id.* at 671.

[90] *Id.*

[91] 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 8.6, at 823 n. 86 (3d ed.1996).

[92] 269 F.Supp. 921 (E.D.Pa.1967).

[93] *See id.* at 923-24.

Fourth Amendment rights. The court offers no precedent or principled argument for stripping Alaskans of these rights. Nor does the court address other rulings limiting the scope of police searches and surveillance, and specifically holding that warrantless secret videotaping of workers is unconstitutional. Today's holding dramatically restricts the rights of Alaskans who do not occupy their own offices: It establishes that secret video monitoring by the police should be among their reasonable expectations. I cannot support this conclusion and therefore respectfully dissent.

In the Supreme Court of the State of Alaska

Lindalee Cowles, Petitioner, v. **State of Alaska,** Respondent.	Supreme Court No. S-08831 Order Petition for Hearing Date of Order: 2/10/99

Trial Court Case # 4FA-95-02145CR
Court of Appeals No. A-6381

Before: Matthews, Chief Justice, and Eastaugh, Fabe, Bryner, and Carpeneti, Justices.

On consideration of the Petition for Hearing, filed on October 16, 1998, and the response, filed on November 3, 1998,

IT IS ORDERED:

1. The Petition for Hearing is GRANTED.

2. Formal briefs conforming to Appellate Rule 212 and excerpts conforming to Appellate Rule 210 shall be filed. The petitioner's opening brief and excerpt shall be served and filed on or before 3/15/99. Briefing and excerpting shall thereafter proceed on the schedule prescribed in Appellate Rule 212(a)(1).

3. Either party may request oral argument within the time allowed by Appellate Rule 213(a).

Entered by direction of the court.

Clerk of the Appellate Courts

/s/ C Jones
Cheryl Jones, Deputy Clerk

MATTHEWS, Chief Justice, dissents.

cc: Supreme Court Justices
Court of Appeals Judges
Judge Beistline
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In the Supreme Court of the State of Alaska

Lindalee Cowles, Petitioner(s), v. **State of Alaska,** Respondent(s).	Supreme Court No. **S-08831** **Order** Petition for Hearing Date of Order: **7/16/01**

Trial Court Case # **4FA-95-02145CR**
Court of Appeals No. **A-6381**

Before: **Fabe, Chief Justice, and Matthews, Eastaugh, Bryner, and Carpeneti, Justices.**

On consideration of the Petition for Hearing, filed on **10/16/98**, and the response, filed **11/3/98**,

IT IS ORDERED:

On the issue of custodial interrogation, the Petition for Hearing is **DISMISSED** as improvidently granted, nunc pro tunc to 06/08/01.

Entered by the direction of the court.

Clerk of the Appellate Courts

/s/ Marilyn May
Marilyn May

cc: Supreme Court Justices
COA Judges
Judge Beistline
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Court of Appeals of Alaska.

Lindalee COWLES, Appellant,

v.

STATE of Alaska, Appellee.

No. A-6381.

July 31, 1998.

Colleen A. Kosluchar, Assistant Public Defender, Fairbanks, and Barbara K. Brink, Public Defender, Anchorage, for Appellant.

Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before COATS, C.J., and MANNHEIMER and STEWART, JJ.

OPINION

COATS, Chief Judge.

Lindalee Cowles was convicted, following a jury trial, of theft in the second degree, a class C felony. AS 11.46.130(a). Superior Court Judge Ralph R. Beistline sentenced Cowles to serve eighteen months of incarceration with twelve months suspended. Judge Beistline placed Cowles on probation for a period of five years. Judge Beistline ordered Cowles to pay restitution of $8,750.83. Cowles appeals her conviction and the order of restitution to this court. We affirm the conviction, but vacate the restitution order and remand for reconsideration of the amount of the restitution.

From October 1993 until April 1995, Lindalee Cowles was the department secretary and the manager of the box office of the Theater Department at the Fairbanks campus of the University of Alaska (UAF). Tickets to theatrical events were sold at this office; patrons paid for the tickets by cash, by check or by credit card. Money received from these ticket sales was periodically deposited at the UAF Business Office.

In March 1995, the university's Business Office and Audit Department became concerned because it appeared that the box office was no longer bringing cash to the Business Office. On March 21, 1995, the university performed an audit of the department and found that cash had stopped being deposited in November 1993, approximately the same time Cowles had started making the theater box office deposits. Cash deposits started up again after the audit, but the auditor concluded that these had been "forced" by the audit.

The audit showed that, although student workers primarily sold the theater tickets, Cowles took responsibility for all of the reconciliations and deposits; furthermore, these deposits were turned in to the Business Office so late that there was "lots of opportunity for manipulation." The auditor sent the results of his audit to UAF counsel on March 30, 1995, concluding that Cowles was likely the person responsible for the shortage of cash deposits.

Additionally, the university received a report in April 1995, from a student worker who was a box office employee, that Cowles was taking money from the box office receipts for her personal use. The student worker

was also concerned because she had seen cash coming in from theater shows which she knew was not being deposited.

In April 1995, UAF officials requested that the UAF Police Department start an investigation. Chief Florian directed Officer Brown to conduct the investigation. On April 20, 1995, Officer Brown installed a video camera in the ceiling over Cowles' desk. On April 22, through the use of a master key, Officer Brown entered Cowles' office and recorded the serial numbers of the money in the safe. The camera was activated on April 24, 1995, and was used to record Cowles' activities at her desk, on and off, for about two and a half hours. Officer Brown testified that he activated the camera at that time because it was a Monday morning, after weekend shows, and he wanted to see if Cowles made a deposit. During this time, Officer Brown was in the ceiling outside of Cowles' office monitoring the recording. The camera recorded Cowles removing a money bag from the safe, altering a cash deposit receipt, taking cash from the money bag and placing it in her desk drawer on three occasions, covering the cash in the drawer with papers, moving the cash from the drawer to her purse and combining it with her own money.

After viewing this activity, Officer Brown went to the district attorney's office. On the afternoon of April 24, 1995, he obtained search warrants authorizing him to search Cowles' purse and her office. Officer Brown and Chief Florian returned to the theater box office, told Cowles that they had search warrants for her office and purse, and advised her to accompany an officer to the UAF Police Department. Cowles became upset and asked

if she was under arrest; Chief Florian told her that she was not and that he would explain it at the office, if she had any questions. The search subsequently revealed that serial numbers on bills found in Cowles' purse matched those on the bills that had been in the safe.

Cowles was transported to the police department by police car, because she was on crutches and could not walk there. According to Cowles' testimony, she was held there, under guard, for 20-25 minutes before being interrogated. According to Florian's and Brown's testimony, Cowles was never restrained in any fashion, or precluded from leaving the building. During that time, Cowles asked if she could make a phone call and was told she could; she called her boss and told him why she was not in the office. When Chief Florian returned to the station, she was invited back to his office for questioning.

During questioning, Cowles was emotional and upset and told Florian that she was not aware of any money being missing. Cowles asked whether she needed an attorney, and Florian responded that he could not advise her on that matter. During this time, Cowles informed Florian that she had $50.00 of theater department cash in her purse that she was using to make change. About 20-25 minutes later, Officer Brown arrived back at the station and the two questioned Cowles for approximately another 30-45 minutes. After being confronted with the evidence from the videotape, Cowles admitted taking some of the money that was allegedly missing, saying she was having problems paying bills. She admitted taking $240.00 from the theater department proceeds and depositing it into her parents' bank account. She also admitted she had taken money from the theater department

deposits before, but had paid it back. She estimated she might have taken a total of $1,000.00 during her employment there. Cowles testified that at the end of her interrogation she was escorted back to her office. She was allowed to collect her personal belongings and leave.

At trial Cowles asserted that her statements to the police were coerced and that she made the statements in an attempt to keep her job. She argued that the university records did not establish that any money was missing. She contended that, to the extent she had taken any money, she had borrowed it intending to pay it back, and therefore had not committed theft. At the conclusion of the trial the jury convicted Cowles on the theft charge.

Cowles first contends that Judge Beistline erred in denying her motion to suppress, which was based upon her claim that the warrantless video tape surveillance of her at her work was an illegal search. Cowles relies on Article I, § 14 and Article I, § 22 of the Alaska Constitution. The Alaska Supreme Court has adopted a two-prong test for construing the scope of Article I § 14 and Article I § 22 of the Alaska Constitution.[1] We set out this test in *State v. Page*, 911 P.2d 513, 515-16 (Alaska App.1996):

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[1] Article I, Sections 14 and 22 provide as follows:

SECTION 14. Searches and Seizures. The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

> Under these sections of the state constitution, a person is protected from unreasonable government intrusion whenever (1) the person manifests a subjective expectation of privacy in the property or activity being subjected to government scrutiny, and (2) this expectation of privacy is one that society recognizes as reasonable.
>
> The first prong of this test (a person's subjective expectation of privacy) presents a question of fact. However, the second prong (the reasonableness of any expectation of privacy) presents a legal question. The answer to this second prong of the test rests on constitutional intent and, ultimately, on a judgement concerning the proper balance to be struck between the rights of the individual and the authority society exercises over individuals through the agency of government.

(Citations omitted.)

In *Page*, the defendant was videotaped by police shortly before and during the delivery of cocaine to an undercover officer. Page moved to suppress the videotaped evidence under *State v. Glass*, 583 P.2d 872 (Alaska 1978). In *Glass*, the Alaska Supreme Court held that the police could not surreptitiously record conversations without first obtaining a warrant. Page contended that the reasoning of *Glass* prohibited video taping his actions without first obtaining a warrant. The state conceded that Page's conversations were protected from warrantless

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SECTION 22. Right of Privacy. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

electronic monitoring by *Glass*. *Page*, 911 P.2d at 515. However, the state argued that the visual record on the video tapes was admissible. *Id.* at 516. We concluded that Page did not have a reasonable expectation of privacy with respect to the observation of his conduct in public places. However, we concluded that Page did have a reasonable expectation of privacy as to his conduct within a private apartment. We stated:

> Page was engaged in a conversation which, the State concedes, was protected from warrantless monitoring under *Glass*. This conversation took place in a private apartment, a location where Page could reasonably expect that his activities would not be observed by anyone except those onlookers whose presence he was aware of. We hold that, in these circumstances, the Alaska Constitution as interpreted by the supreme court in *Glass* requires the police to secure a warrant before engaging in surreptitious videotaping of conversation. It makes no difference that the police turn down the audio recording level on their equipment.

Id. at 517.

Judge Beistline found that "Ms. Cowles harbored a subjective belief that her actions in the box office the morning of May 29, 1995, would be private and thus not subject to electronic monitoring." The state does not contest this finding. Therefore, this case turns on whether Cowles' "expectation of privacy is one that society recognizes as reasonable." *Id.* at 515. Applying the *Page* analysis to this case, we must determine whether Cowles' work place in the theater box office was a location where Cowles could reasonably expect privacy in her activities.

The theater box office is located inside of the Great Hall, a common area that connects the theater with various other departments in the UAF Fine Arts Complex. The box office is small, measuring approximately 12 by 18-20 feet, with a large window in the front, from which the office sold tickets to the public, and a door on the side, which was usually kept open.[2] The window was a "roll-up" window that opened and closed. Aside from Cowles' desk, the office was equipped with a student desk, computers, a safe, and file cabinets. Officer Brown testified that, from the window, the public could view Cowles' desk, portions of the top of her desk, her computer, and Cowles sitting behind her desk.

Because the office had cement walls, Officer Brown set up the video equipment through the vent system, in the office's ceiling. Officer Brown also testified that any member of the public could see everything in the camera's range if they walked around from the box office door to the window. In finding that Cowles could not reasonably expect that her activities would be private, Judge Beistline made the following findings:

> Ms. Cowles' activities on the day in question could have been readily observed in great detail by any member of the public who happened to visit the office or ticket window. This fact weighs heavily against a finding that society would be prepared to recognize her privacy expectation as reasonable. Another factor which

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[2] The door was equipped with a built-in combination lock, changed once or twice per semester; however, Officer Brown testified that the door was kept open for ventilation purposes.

suggests that any subjective expectation of privacy by Ms. Cowles is objectively unreasonable is the presence of numerous co-workers and visitors during the surveillance in question. In this regard the Court notes that in viewing the videotape, it is clear that Ms. Cowles' desk appears to have been quite busy. The tape reveals an almost continuous flow of traffic about her desk. Ms. Cowles is seen conversing with various people at different locations in relation to her desk. At one point someone brings her a sandwich, at another point a hand appears and Ms. Cowles can be clearly seen thrusting a large wad of cash into its outstretched palm. Another instance which the Court found particularly telling was a point in the tape when Cowles retrieves the cash from her desk and begins counting and sorting the bills. During the period when she is obviously handling a large amount of cash (at least some of which originated from the locked bank bag containing the receipts of the weekend performances), a person appears to her left and starts a lengthy conversation. The fact that person could appear and observe Ms. Cowles' desk precisely at the time when presumably her privacy interest is most heightened serves to seriously undermine the privacy right now asserted by Ms. Cowles. Even if that person were a coworker, Ms. Cowles' privacy assertion was seriously undermined by the fact that she's sorting the University's money taken from her desk, right under the nose of another person. Under these circumstances the Court cannot find that the second prong of the test is met.

Although we are to uphold Judge Beistline's factual findings unless they are clearly erroneous, we must determine *de novo*, based upon the facts which he found, whether to uphold his finding that Cowles' expectation of privacy was not one that society would recognize as reasonable. *See Page*, 911 P.2d at 515. We conclude that Judge Beistline did not err in making this determination.

In *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir.1987), the court stated that video "surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state." In *United States v. Torres*, 751 F.2d 875, 882 (7th Cir.1984), the court stated: "television surveillance is exceedingly intrusive . . . and inherently indiscriminate, and . . . could be grossly abused – to eliminate personal privacy as understood in modern Western nations." *See also State v. Bonnell*, 75 Haw. 124, 856 P.2d 1265, 1277 (1993); *State v. Thomas*, 642 N.E.2d 240, 245 (Ind.App.1994).

But, several factors lead us to the conclusion that Cowles' constitutional rights were not infringed in this case. Cowles was videotaped in a place where, accordingly to Judge Beistline's findings, her activities "could have been readily observed in great detail by any member of the public who happened to visit the office or ticket window." In addition, her activities were open to view by fellow employees. Judge Beistline observed that there was "an almost continuous flow of traffic about her desk." We therefore believe that the open and public nature of the place where Cowles worked argues against finding that she had a reasonable expectation of privacy. *See G.R. v. State*, 638 P.2d 191, 197 (Alaska App.1981).

A second basis for finding that the videotaping was reasonable is that Cowles worked in a fiduciary capacity in an office where members of the public exchanged money for tickets. Money belonging to the university was regularly handled in the office, and was stored in a safe to which Cowles had access. Video surveillance is commonly conducted in stores and commercial offices where money is exchanged, such as areas in banks where tellers work. Thus, the nature of the work performed in Cowles' office argues against finding that she had a reasonable expectation of privacy.

Based upon the open and public nature of the place where Cowles worked, and the fiduciary nature of the work she was doing, we conclude that Cowles did not have a reasonable expectation of privacy from video surveillance in the box office. We accordingly conclude that the police actions did not violate Article I § 14 of the Alaska Constitution.[3]

Cowles next contends that Judge Beistline erred in failing to suppress the statements which she made to the police when she was questioned at the UAF Police Department. Cowles points out that the police never gave her *Miranda* warnings and contends that because she was subject to custodial interrogation the trial court should have suppressed her statements.

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[3] In *Anchorage v. Ray*, 854 P.2d 740, 750 (Alaska App.1993), we recognized that "the right to privacy granted by Article I § 22 does not create a separate independent right to seek exclusion of evidence."

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court established safeguards to protect against the danger of coercion inherent in custodial surroundings. "In order for a person's *Miranda* rights to be triggered, the statements must be the product of both custody and interrogation." *Beagel v. State*, 813 P.2d 699, 705 (Alaska App.1991).

In *Hunter v. State*, 590 P.2d 888 (Alaska 1979), the Alaska Supreme Court adopted an objective test for determining when a person is in custody for purposes of *Miranda*: if a reasonable person in the suspect's position would not have felt free to leave and break off police questioning, then the defendant was in custody. *Id.* at 895; *see also Edwards v. State*, 842 P.2d 1281, 1284-85 (Alaska App.1992) (finding defendant's *Miranda* rights violated when police conditioned his freedom to leave the police station on his willingness to answer questions). The *Hunter* decision provides general guidelines for making the custody determination:

> At least three groups of facts would be relevant to this determination. The first are those facts intrinsic to the interrogation: when and where it occurred, how long it lasted, how many police were present, what the officers and the defendant said and did, the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door, and whether the defendant was being questioned as a suspect or as a witness. Facts pertaining to events before the interrogation are also relevant, especially how the defendant got to the place of questioning – whether he came completely on his own, in response to a police request, or

> escorted by police officers. Finally, what happened after the interrogation – whether the defendant left freely, was detained or arrested – may assist the court in determining whether the defendant, as a reasonable person, would have felt free to break off the questioning.

Id. at 895 (footnotes omitted).

The trial court concluded that Cowles was not in custody during her interview:

> Here the interrogation took place at the University police station over the course of approximately two hours with one and then two officers present. The officers indicated that Ms. Cowles was caught on [video] tape and wanted to hear her side of the story. There is no doubt she was being interviewed as a suspect, and there is no doubt she left on her own free will and was not arrested. Cowles was escorted to the police station in a police car; however, this fact has little weight when one understands that Ms. Cowles was injured at the time and required the assistance of a crutch or cane to move around. When Ms. Cowles determined to terminate the interview and leave, she accepted a ride to her car in a police vehicle. . . . [T]he fact that Cowles was interviewed at the police station appears to have been motivated by convenience to both parties rather than being an attempt to further a custodial purpose. . . . Reviewing the tape in this case convinces the Court that . . . a reasonable person in Lindalee Cowles' position would have felt free to leave or cut off police questioning.

Our review of the record convinces us that Judge Beistline did not err in determining that a reasonable person in Cowles' position "would have felt free to break

off the questioning." *See Hunter*, 590 P.2d at 895. Judge Beistline found that the officers took Cowles to the police station for the convenience of both Cowles and the police. At the beginning of the interview, the police assured Cowles that she was not under arrest. Our review of the tape leads us to the same conclusion which Judge Beistline reached: Cowles was not in police custody. As Judge Beistline pointed out, at the end of the questioning, Cowles told the police that she needed to go. It appears that she fully expected to go home as soon as she asked and the police quickly terminated the interview in response to her request. We conclude that Judge Beistline did not err in denying Cowles' motion to suppress her statements.[4]

Cowles contends that Judge Beistline erred in limiting testimony of two defense witnesses. Cowles intended to present testimony from Linda Aronow-Brown regarding the change-making practices of both the Theater Department box office and the Fairbanks Light Opera Theater. In an offer of proof, Aronow-Brown testified that she had worked as a secretary assisting the box office manager of the UAF Speech and Drama Department and that she had worked as a box office manager for the Fairbanks Light Opera Theater. According to Aronow-Brown, in both theater box offices, the box office manager

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[4] Cowles argues that Judge Beistline erred in failing to dismiss the indictment and in failing to suppress evidence which resulted from the video tape surveillance and her statements. We affirm these rulings based upon our conclusion that Judge Beistline did not err in refusing to grant Cowles' motion to suppress the video tape evidence and her motion to suppress her statements.

would make change by taking big bills out of the till and putting them in a pocket or purse until change could be gotten from the UAF Business Office or a bank.

The state objected to Aronow-Brown's testimony on relevancy grounds, but the trial court ruled that Cowles could present the testimony. However, after Aronow-Brown testified regarding the change-making practices of the UAF Theater Department and as she began testifying about the change-making practices of the Fairbanks Light Opera Theater, the state reasserted its objection, and the trial court cut off further questioning on the practices.

Cowles points out that since she was videotaped putting box office cash in her purse, testimony that would provide a reason for the cash to be there would be relevant. However, Aronow-Brown was allowed to testify to the change-making procedure at the UAF Theater Department. We conclude Judge Beistline did not abuse his discretion in refusing to allow Cowles to have Aronow-Brown testify about the change-making procedures at the Fairbanks Light Opera Theater. Judge Beistline could properly determine that this testimony would have little or no relevance. *See* Alaska Evidence Rules 402, 403.

Cowles argues that Judge Beistline erred in refusing to allow her to present testimony from Marie Scholle, who had worked in UAF's Risk Management Department and had been a campus police officer, about various break-ins that had occurred in the offices in the Great Hall, where the Theater Department box office was located, during the time that cash was reportedly missing

from the Theater Department box office.[3] After hearing Scholle's proposed testimony, Judge Beistline concluded that there was no connection between the thefts about which Scholle would testify and the embezzlement that occurred in the Theater Department box office. We conclude that Judge Beistline did not err in making this decision. *See Smithart v. State*, 946 P.2d 1264, 1275-79 (Alaska App.1997) (holding evidence of potential guilt by third party must be directly related to crime charged against defendant).

Cowles contends that Judge Beistline erred in calculating the amount of restitution which he ordered her to pay to the University of Alaska. In *Noffsinger v. State*, 850 P.2d 647, 650 (Alaska App.1993), we discussed the standard of review for an award of restitution:

> An award of restitution must be supported by substantial evidence. If uncertainty exists, the appropriate amount for restitution must be proved by a preponderance of the evidence. When the accused, on appeal, challenges the sufficiency of the evidence as to restitution, this court does not pass on issues of credibility, which remain within the sole province of the sentencing court. Instead, as in other situations involving claims of insufficient evidence, we construe the record in the light most favorable

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[3] We note Aronow-Brown was previously allowed to testify that thefts had occurred in the UAF Communications Department office, located adjacent to the Theater Department box office, during this same time. Therefore, some of the evidence Cowles was seeking to present to the jury through Scholle's testimony had already been presented through the testimony of Aronow-Brown.

> to the state and determine whether a reasonable fact-finder could conclude that the disputed amount of restitution was established by a preponderance of the evidence.

(Citations omitted).

At Cowles' sentencing hearing, the court considered the testimony of Ben Shilling, the university's acting director of internal audits. Cowles presented the testimony of Rockne Wilson, a certified public accountant. Shilling's testimony summarized a report he had prepared that analyzed the theater box office's revenues before, during, and after Cowles' tenure and that computed the total deposits for the fiscal years 1993, 1994, 1995, and 1996, and then broke those total deposits down into the portions comprised of cash, checks, and credit card charges. Shilling also calculated the totals based on the period when Cowles was serving as the sole box office manager and the period outside of her tenure as sole box office manager. Shilling calculated that during the 1993-1996 time frame when Cowles was not the box office manager, approximately 25% of the total deposits made by the box office were in the form of cash; however, when Cowles was the manager, during 1993-1995, only 7% of the total deposits were in the form of cash. Based on Shilling's calculations, the state requested restitution in the amount of $12,000.

Shilling's analysis was based upon the assumption that Cowles had tampered with the records of ticket sales on the box office computer system and/or had substituted checks written to the UAF Theater Department, for something other than tickets, for cash. He concluded that

a simple balancing of ticket sales against cash receipts would not accurately reflect the cash shortage.

Rockne Wilson, the accountant who testified on Cowles' behalf, testified that Shilling's report was based on the unproven assumption that the ticket sales information in the computer had been manipulated; and, since he did not agree with that assumption, he concluded that the audit reports failed to show that any cash was missing from the UAF Theater Department box office.

Judge Beistline accepted Shilling's basic calculations, but he reduced the expected percentage of cash deposits from 25% to 20%, thus figuring that 20% of the total deposits during Cowles' tenure as the sole box office manager should have been cash. Judge Beistline's calculations can be set out as follows:

	Fiscal Year 94	Fiscal Year 95	Total
Total deposits	$35,499.99	$32,279.28	
Expected cash (20% of total)	7,099.99	6,455.85	
Actual cash deposited	2,635.50	2,169.50	
Estimate of missing cash	$ 4,464.49	$ 4,286.35	$ 8,750.84

From our review of the record, we conclude that Judge Beistline could properly rely on Shilling's estimates to determine the proper amount of restitution. In *Noffsinger*, 850 P.2d at 649-50, we upheld a restitution

award which was based upon a similar well-grounded expert estimate.

In her brief, Cowles points out that the indictment in her case charged her with committing theft from September 1, 1994, through April 23, 1995. This time period corresponds with fiscal year 1995 in Shilling's calculations and in the court's findings. Cowles argues that there was no basis to require her to pay restitution for fiscal year 1994, a time period which was not covered by the dates specified in the indictment.The state has not replied to Cowles' contention. Judge Beistline did not address this issue in his findings and we have no basis to resolve this issue on appeal at this time. We accordingly remand this issue to the trial court for reconsideration.

Cowles next contends that Judge Beistline erred in denying her motion for a new trial. Following sentencing, Cowles alleged that evidence presented by the state at the sentencing hearing was newly discovered evidence which warranted a new trial. In order to show she was entitled to a new trial based on newly discovered evidence, Cowles needed to establish that: (1) the evidence relied upon was actually discovered after the trial; (2) she was diligent; (3) the evidence relied on was not merely cumulative or impeaching; (4) the evidence relied on was material; and (5) the evidence relied on would probably result in an acquittal at a new trial. *See State v. McDonald*, 872 P.2d 627, 656 (Alaska App.1994).

Cowles' motion was based on the testimony of Ben Shilling, the university's acting director of internal audits, who testified about the audit which he performed for UAF to estimate the amount of money Cowles had

stolen. Cowles pointed to the fact that Shilling's data at sentencing showed that the amount of reported ticket sales was only $799 more than the amount which was deposited for ticket sales, while at trial, Shilling had testified that accounting documents showed $5,000 missing. However, as Shilling stated at the sentencing hearing, the state's calculations and conclusions, regarding the amount of money missing, did not rest simply on the comparison between ticket sales and deposits, but on the assumption that Cowles had manipulated the underlying records and on an analysis of the percentage of the total box office deposits that should have been cash. As the state points out, even if the $799 figure accurately reflected the amount of money which Cowles stole, Cowles would still be guilty of theft in the second degree, which covers thefts of property valued at $500 or more. *See* AS 11.46.130(a). We therefore conclude that Judge Beistline did not abuse his discretion in determining that the evidence which Cowles offered was not so exculpatory that it would probably result in an acquittal at a new trial.

The conviction is AFFIRMED. The case is REMANDED for reconsideration of the amount of restitution. And, having decided the issues in this appeal that are within our jurisdiction, we now REFER the sentencing portion of Cowles' case that is outside our jurisdiction to the supreme court under Alaska Appellate Rule 215(k).

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

STATE OF ALASKA, Plaintiff,	)	
vs.	)	4 FA-S95-2145 Cr.
LINDALEE COWLES, Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

(Filed Mar. 26, 1996)

Lindalee Cowles has moved for reconsideration of this Court's January 11, 1996, "Order Denying Motion To Suppress Videotape, Interrogation, And Search Warrants, And To Dismiss Indictment." Cowles claims that the law which the Court relied upon has been subsequently changed by a recent Court of Appeals decision, *State v. Page*, No. 1458 (Alaska Ct. App. February 9, 1996). After considering Cowles' motion, the Court reaffirms its earlier decision in this matter and hereby **DENIES** Defendant's motion for reconsideration.

In denying Cowles' suppression motion, the Court relied on the fact that Cowles' office was a public place. Cowles claimed a privacy interest which society is not prepared to recognize as reasonable. She was engaged in a public undertaking (ticket office manager) in a very public building (Great Hall). The Court carefully set forth the facts which made the area which was videotaped a

public place. The Court's opinion did not rely on the fact that the audio was turned off. It did not need to. If a place is public, and it is an area which society is not prepared to recognize as private, one's activities in such a place may be viewed, without a warrant, by anyone, including police officers.

Page involved the surreptitious recording of a drug dealer in a private apartment. An apartment is a private place and a *Glass* warrant must be obtained before one's private conversations are recorded in such a place. *Page* merely held that a *Glass* warrant is required even if the noise is turned off.

Page involved a surreptitious recording of a private area (apartment). Society is prepared to recognize that privacy interest as reasonable. Hence, a warrant must be obtained before that privacy is invaded, whether or not the sound is turned off. Because Cowles' asserted privacy interest was not objectively reasonable, no warrant was required, whether or not the sound was turned off. Cowles was videotaped in a public place, Page was videotaped in a private apartment. That fact distinguishes the two cases.

ENTERED at Fairbanks, Alaska, this 26 day of March, 1996.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
SUPERIOR COURT JUDGE

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA, Plaintiff,	)	
vs.	)	
LINDALEE COWLES, Defendant.	)	4FA-S95-2145 Cr.

ORDER DENYING MOTION TO SUPPRESS VIDEOTAPE, INTERROGATION, AND SEARCH WARRANTS, AND TO DISMISS INDICTMENT

(FILED JAN 11, 1996)

I. INTRODUCTION

Before the Court is Defendant's motion to suppress various items of evidence, as well as a motion to dismiss the Indictment if it is found that illegally obtained evidence appreciably affected the outcome of those proceedings. The Court has reviewed the testimony presented at a bifurcated hearing conducted on December 7, 1995, January 5, 1996, and January 8, 1996, as well as examined the contents of the videotape and audio cassette furnished the Court at said hearings. The Court has further studied the briefs of counsel on this issue and relevant case law cited therein. The Court has also considered the arguments of counsel. Based on all of the above, it is the Court's view that none of the evidence argued about at

the hearings in this matter has been acquired in derivation of Ms. Cowles' constitutional rights. The Court specifically holds that the surveillance video of Ms. Cowles did not violate any privacy interest she held under the Alaska Constitution, nor was a *Glass* warrant required under the circumstances. The Court further holds that any statement Ms. Cowles gave to the University Police was not the product of a custodial interrogation and thus there was no *Miranda* violation.

Because the evidence discussed above has been determined to be legally obtained, any search warrants which were secured as a result of the videotape or the statement were supported by probable cause. It also follows from the above ruling that the Indictment will not be dismissed. Defendant's motion is therefore **DENIED**.

II. THE VIDEOTAPE

Testimony taken at the hearing established that the University was becoming increasingly concerned with an apparent theft problem at the box office theatre during the early part of 1995. Following an internal audit, suspicion was cast upon the Defendant, particularly after at least one former student worker had reported Ms. Cowles' alleged mishandling of theatre receipts. On May 24, 1994, Officer Brown of the University Police Department installed a video camera directly above Ms. Cowles' desk, which is located in the box office at the theatre. The acknowledged intent of the officers was to monitor the procedures Ms. Cowles utilized when preparing deposits from the proceeds of theatre events held at the facility. Specifically the officers were monitoring for indications

of wrongdoing on the part of Ms. Cowles. The camera was installed on that day because the officers knew that a play was to be held that weekend which would generate receipts for deposit the following Monday. Such camera was activated on Monday morning and recorded Ms. Cowles' activities while seated at her desk. Some of the activities which Ms. Cowles can be seen doing include opening the safe where a bank bag is kept, opening the bank bag, removing the contents of the bank bag, separating the cash from the checks and credit card receipts, dividing that cash into two stacks, placing one stack of cash in her desk, eating lunch, fielding various phone calls, conversing with several different people at different locations about her desk, placing a handful of cash into an outstretched hand on the lower left of the screen, removing cash from her desk, counting said cash while talking to somebody at her desk, placing said cash in her wallet or purse, and working with her computer.

The right of privacy in Alaska is one specifically enumerated in our Constitution in Article I, §§ 14 and 22. This right is not derived from the "penumbras and emanations" of other delineated rights as is the case with the federal right to privacy. *See Roe v. Wade*, 410 U.S. 113 (1973). A recognized right to privacy is one area in which Alaskan citizens enjoy a broader right than that conferred by the federal constitution. *Ravin v. State*, 537 P.2d 494 (Alaska 1975). Federal courts have recognized the power of the states to regulate the right to privacy in a manner broader than the federal protection. *Katz v. United States*, 389 U.S. 347 at 350-51 (1967). In the context of warrantless, surreptitious recording of one's private conversations, trial courts have relied on the Alaska Supreme

Court's decision in *State v. Glass*, 583 P.2d 872 (Alaska 1978). *Glass* holds that governmental monitoring of one's private conversations is violative of the Alaska Constitution. The parameters of this right to be free from governmental eavesdropping is not yet fully defined. The Alaska Court of Appeals at one time felt that the *Glass* decision required the suppression of any surreptitious tape recording. *Quinto v. City and Borough of Juneau*, 664 P.2d 630 (Alaska App. 1983). At issue in *Quinto* was the admissibility of the contents of a recording made by a police officer during a conversation with a motorist suspected of drunken driving. The Alaska Supreme Court later determined that the Court of Appeals had applied *Glass* too broadly. *City and Borough of Juneau v. Quinto*, 684 P.2d 127 (Alaska 1984). In reversing the Appeals Court, the Court reiterated its earlier adoption of the *Katz* two-prong test in determining whether a person's privacy right has been invaded under Article I, § 22. The test is thus: (1) did the person harbor an actual (subjective) expectation of privacy, and if so, (2) is that expectation one that society is prepared to recognize as reasonable? *Id.* at 129, citing *State v. Glass*, 583 P.2d at 875. It is that second prong that *Quinto* could not meet. The Court could not find that Mr. Quinto's expectation of privacy in his conversation with a uniformed police officer was one which society was prepared to recognize as reasonable. For the same reason, Ms. Cowles' motion to suppress the videotape must be denied. Based on the testimony of the Defendant herself, the Court will concede that Ms. Cowles harbored a subjective belief that her actions in the box office the morning of May 29, 1995, would be private and thus not subject to electronic monitoring. Society,

however, is not prepared to recognize that belief as reasonable. According to the evidence adduced at the hearing on this matter, combined with the Court's viewing of the videotape in question, it is clear that Ms. Cowles' office is a public place. Indeed, another videotape made by Ms. Cowles herself does little to dispel the fact that the box office is a public place. After viewing the tape and assessing the rather limited confines of the box office, it is clear to the Court that no one working in that office during business hours, with or without the window open, would have an objectively reasonable expectation of privacy. There is a large ticket window which exposes frequently Cowles' desk to the public at large. It was clear to the Court in viewing both of the videotapes that Ms. Cowles' desk was actually positioned in an area which is readily visible from any member of the public who may approach the door or ticket window, or even perhaps simply be wandering about the Great Hall. Certainly coworkers in the small office could see Defendant. As long as the area in question is a public place or the activity observed is within "open view" from a vantage point which a member of the public may legally occupy, then it has been held that no warrant need be issued. At the federal level this has been held to be true in the case of a police search of a background greenhouse through the employment of a helicopter which hovered less than 300 feet above an opening in the roof of the greenhouse, thereby allowing the police officers to look inside and observe marijuana plants. A warrant was not required in that situation because any member of the public could have been occupying that navigable airspace and could have observed what the officers did (marijuana). Such an

observation was not a search. *California v. Ciraolo*, 90 L.Ed. 2d 210 (1986). It is doubtful Alaska's Constitution would allow such a search as that which was conducted in *Ciraolo*; however, the "open view" doctrine still has considerable weight when applying the second prong of the *Katz* test as adopted by *Glass*. Ms. Cowles' activities on the day in question could have been readily observed in great detail by any member of the public who happened to visit the office or ticket window. This fact weighs heavily against a finding that society would be prepared to recognize her privacy expectation as reasonable. Another factor which suggests that any subjective expectation of privacy by Ms. Cowles is objectively unreasonable is the presence of numerous co-workers and visitors during the surveillance in question. In this regard the Court notes that in viewing the videotape, it is clear that Ms. Cowles' desk appears to have been quite busy. The tape reveals an almost continuous flow of traffic about her desk. Ms. Cowles is seen conversing with various people at different locations in relation to her desk. At one point someone brings her a sandwich, at another point a hand appears and Ms. Cowles can be clearly seen thrusting a large wad of cash into its outstretched palm. Another instance which the Court found particularly telling was a point in the tape when Cowles retrieves the cash from her desk and begins counting and sorting the bills. During the period when she is obviously handling a large amount of cash (at least some of which originated from the locked bank bag containing the receipts of the weekend performances), a person appears to her left and starts a lengthy conversation. The fact that

person could appear and observe Ms. Cowles' desk precisely at the time when presumably her privacy interest is most heightened serves to seriously undermine the privacy right now asserted by Ms. Cowles. Even if that person were a co-worker, Ms. Cowles' privacy assertion was seriously undermined by the fact that she's sorting the University's money, taken from her desk, right under the nose of another person. Under these circumstances the Court cannot find that the second prong of the test is met. While some areas of the work place may be considered private and therefore not subject to unwarranted government surveillance, other areas of a work place certainly do not so qualify. It is the Court's decision that the photos taken of Ms. Cowles' desk area by a hidden camera do not violate either Ms. Cowles' privacy rights nor her right to be free from unreasonable searches and seizures.

As an aside, the Court is concerned that a search warrant was not obtained. Certainly probable cause for such a warrant existed and it would have been easy to obtain. Under these circumstances, law enforcement officers should be strongly encouraged to obtain search warrants even when the law may not technically require it, as the case here.

III. THE INTERVIEW

It is a well established principle of constitutional law that a criminal defendant be informed of his rights prior to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966). The task for a trial court in situations where no *Miranda* warnings were given is to determine whether

questioning was initiated "after a person has been taken into custody or otherwise deprived of his freedom in any significant way." *United States v. Hall*, 421 F.2d 540 (1969).

To aid trial courts in determining this question, the Alaska Supreme Court, in the seminal case of *Hunter v. State*, 590 P.2d 888 (Alaska 1979), has adopted an objective, reasonable person standard for judges to use in determining questions about whether an interrogation was custodial.

> [T]he inquiry, as expressed by the court in *United States v. Hall*, 421 F.2d at 545, is whether: in the absence of actual arrest something . . . [is] said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates [to the defendant] that they would not have heeded a request to depart or to allow the suspect to do so. This requires some actual indication of custody, such that a reasonable person would feel he was not free to leave and break off police questioning.

Id. at 895 (footnote omitted). The Court finds that *Hunter* provides the applicable test for determining custody in Alaska. The *Hunter* Court set forth several specific criteria for trial courts to look at in addressing this issue. Among these are where it occurred? How long did it last? How many police were present? What was said by the officers or the defendant? Whether the defendant was being questioned as a suspect or a witness? How the defendant got to the place of questioning? And what happened after the interrogation (was the suspect arrested or released)? All of these inquiries "may assist the court in determining whether the defendant, as a

reasonable person, would have felt free to break off the questioning." *Hunter* at 895.

Here the interrogation took place at the University police station over the course of approximately two hours with one and then two officers present. The officers indicated that Ms. Cowles was caught on tape and wanted to hear her side of the story. There is no doubt she was being interviewed as a suspect, and there is no doubt she left on her own free will and was not arrested. Cowles was escorted to the police station in a police car; however, this fact has little weight when one understands that Ms. Cowles was injured at the time and required the assistance of a crutch or cane to move around. When Ms. Cowles determined to terminate the interview and leave, she accepted a ride to her car in a police vehicle. The method of transportation used for Cowles seems more accurately described as a benevolent gesture by the police department rather than one evincing a plan to deprive Ms. Cowles of her freedom. Similarly, the fact that Cowles was interviewed at the police station appears to have been motivated by convenience to both parties rather than being an attempt to further a custodial purpose. In this regard, the Court is mindful of the potentially negative repercussions which attend a police interview in a public place. In looking at the totality of the circumstances here, the Court acknowledges that many of the factors set forth in *Hunter*, at first blush, would seem to indicate that the interrogation at issue here was custodial in nature. These enumerated factors, however, are only to be considered to assist the Court in

determining the ultimate question of whether the Defendant, as a reasonable person, would have felt free to break off police questioning.

Of particular relevance in determining such a question is the recorded interview itself. This is the best evidence for determining whether the interrogation was custodial. Reviewing the tape in this case convinces the Court that although the objective circumstances surrounding the interview would initially suggest that the interview was custodial in nature, it is clear to the Court that after studying the tape of the actual interview, a reasonable person in Lindalee Cowles' position would have felt free to leave or cut off police questioning.

Indeed Ms. Cowles herself clearly felt free to leave. This is evidenced by the dialogue at the end of the interview when Cowles can be heard telling the officers that she has to go home pretty soon, and then asking them if she is supposed to report to work the following morning. The fact that she in fact does thereafter leave on her own free will indicates that she was free to leave at any time. The above statements made by Ms. Cowles in reference to her need to leave "pretty soon" would not logically emanate from one who thought they were under arrest and therefore not free to leave. The overall tone of the questioning, which is evident throughout the interview, lends further support to the Court's analysis that the interrogation of Ms. Cowles was not custodial. If an interview is not custodial in nature, no *Miranda* warnings need issue.

Defendant has testified that she was removed from her office, taken to the police station, intrusively

searched, and put under guard by underlings of Chief Florian. She has also testified that there was a changing of the guard, so to speak, while she waited in the interrogation room. Apparently a phone call had come in and one guard replaced the other and, when so doing, asked a question similar to "is she under arrest?" If the Court were to accept Ms. Cowles' version of events, there would certainly be reason to believe that a reasonable person in her situation would not have felt free to leave at that point. The Court, however, is more impressed with the credibility of the testimony of the officers and the tape of the interview which tend to prove that Ms. Cowles was not in custody at any time, and that under the circumstances a reasonable person would have felt free to leave.

Officer Brown testified that Chief Florian departed the box office about the same time as Cowles in order to interview Cowles at the station. This is consistent with the rest of the evidence. The recorded interview begins with Chief Florian saying "Linda, you are not under arrest, we just want to talk to you about some monies coming in from the plays." Shortly thereafter Cowles invites Florian to search her: "You're more than welcome to have someone search me, I don't mind." It is only after this invitation that Florian sends a female officer in to search the Defendant. Cowles then tells the female officer that she wants "a complete search" conducted because "I want them to have absolutely no doubt." Cowles' language on the tape is more persuasive to the Court than her recent testimony which indicated that she was subject to an intrusive body search.

Cowles has also testified that the police denied her access to her keys, thus depriving her of the freedom to leave. The tape disputes this contention. On the tape Ms. Cowles can be heard asking Chief Florian, "Can I pick up my keys and stuff?" To this question, Florian responds, "absolutely."

The Defendant has also suggested that the police somehow coerced her confession by making certain promises to Cowles regarding her job. The Court can find no evidence of promises which might rise to a level of coercion. It is clear that Cowles liked her job and didn't want to be fired. She made this fact very clear to the officers, who responded with suggestions that the University would bend over backwards to help one of its employees, but those employees would need to first cooperate with the University's investigation. Nowhere did they make an outright promise that if Cowles admitted to taking money then she would be to keep her job and would not be prosecuted. They suggested this, of course, but only in a vague language. The officers may have taken advantage of Cowles' fear of losing her job, but the Court knows of no case which holds that this is an unacceptable interrogation technique. Cowles is arguing that the officers tricked her into believing that by admitting to the embezzlement of over a thousand dollars from her employer, her job would be secure. A reasonable person, however, would have understood the absurdity of this belief.

The police did nothing illegal in suggesting that they would like to help her keep her job or that they would not prosecute if she cooperated.

Because Ms. Cowles' testimony has been discredited by reference to the best evidence of the interview, the Court gives little weight to her contention regarding the accusation that she was put under guard in a back room for a substantial period of time and that the deputies considered her a prisoner. Even if this were true, that fact alone could not, by itself, support the contention of custody in this case.

After hearing all the available evidence presented over the course of three evidentiary hearings, and relying heavily on the tape of this interview, the Court concludes that Cowles was not under custody, according to the *Hunter* test.

Again, however, as an aside, the Court notes that the most prudent course of action would have been to advise Defendant of her *Miranda* rights. The law does not require it here, but law enforcement officers should be encouraged to follow *Miranda* in any close situations.

IV. SEARCH WARRANT EVIDENCE

As the motion for suppression of the various search warrants are predicated on the poisonous tree doctrine, and the Court has previously found the videotape and recorded interview admissible and free of constitutional defect, the warrants cannot be considered poisonous fruit and therefore will not be suppressed. For the same reason the Court finds the evidence supporting the Indictment is sufficient.

V. CONCLUSION

For the reasons set forth above, the challenged evidence should not be suppressed and the Indictment shall stand. Therefore, Defendant's "Motion to Suppress Videotape, Interrogation, And Search Warrants, And To Dismiss Indictment" is hereby **DENIED.**

ENTERED at Fairbanks, Alaska, this 11 day of January, 1996.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
SUPERIOR COURT JUDGE

In the Supreme Court of the State of Alaska

Lindalee Cowles, Appellant, v. **State of Alaska,** Appellee.	Supreme Court No. S-08831 **Order** Petition for Rehearing Date of Order: 7/16/01

Trial Court Case #4FA-95-02145CR
Court of Appeals #A-6381

Before: Fabe, Chief Justice, and Matthews, Eastaugh, Bryner, and Carpeneti, Justices

On consideration of the Petition for Rehearing filed on 6/18/01,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered by the direction of the court.

Clerk of the Appellate Courts

/s/ Marilyn May
Marilyn May

Fabe, Chief Justice, and Bryner, Justice, dissenting; they would grant rehearing.

cc: Supreme Court Justices
Court of Appeals Judges
Judge Beistline
Central Staff
Trial Court Appeals Clerk – Fairbanks
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IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,)
Plaintiff,)
vs.)
LINDALEE COWLES,)
Defendant.)

No. 4FA-S95-2145 CR

MOTION TO SUPPRESS VIDEOTAPE, INTERROGATION, AND SEARCH WARRANTS, AND TO DISMISS INDICTMENT

(Filed Nov. 13, 1995)

CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

COMES NOW Lindalee Cowles, by and through her counsel Robert John, and hereby moves to suppress a warrantless videotape which the police made of Lindalee Cowles and any evidence obtained as a result thereof, any statements which Cowles may have made to the police, and search warrants 95-98, 95-99, 95-109, 95-110,

95-111, 95-112, and 95-128. Correspondingly, Lindalee Cowles moves to dismiss the Indictment in this case.

This motion is supported by the accompanying memorandum.

DATED this 13th day of November, 1995, at Fairbanks, Alaska.

LAW OFFICE OF ROBERT JOHN

By: /s/ Robert John
Robert John/ABA #9011069
Attorney for Linda Cowles

I certify that true copies of the foregoing Motion, Memorandum in Support, and proposed Order were delivered on this date to: Office of the District Attorney

By: Mary Davis Date: 11/13/95

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,
Plaintiff,
vs.
LINDALEE COWLES,
Defendant.

No. 4FA-S95-2145 CR

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS VIDEOTAPE, INTERROGATION, AND SEARCH WARRANTS, AND TO DISMISS INDICTMENT

(Filed Nov. 3, 1995)

CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

COMES NOW Lindalee Cowles ("Linda Cowles"), by and through her counsel Robert John, and hereby submits

her Memorandum in Support of Motion to Suppress Videotape, Interrogation, and Search Warrants, and to Dismiss Indictment.

FACTUAL BACKGROUND

The transcript of the grand jury proceedings is attached to this memorandum as Exhibit A. As the transcript reveals, the evidence whereby an Indictment was returned in this case derives from three essential sources: (1) a warrantless videotape which the police made of Lindalee Cowles; (2) a purported confession and bank account information which Cowles allegedly gave to the police; and (3) evidence obtained pursuant to a series of seven search warrants issued to the police, numbers 95-98, 95-99, 95-109, 95-110, 95-112, and 95-128, *see* Exhibit B. Since all of the above evidence was illegally obtained, the evidence must be suppressed and the Indictment must be dismissed.

DISCUSSION

I. SUPPRESSION OF THE WARRANTLESS VIDEOTAPE OF LINDA COWLES.

Under *State v. Glass*, 583 P.2d 872 (Alaska 1978), *on rehearing*, 596 P.2d 10 (Alaska 1979), the police are required to obtain a search warrant where they electronically monitor an individual's actions. While the State may nonetheless maintain that the *Glass* requirement applies only where they are recording an individual's conversation as opposed to videotaping her actions, the

Glass decision itself contains no such limitation and subsequent Alaska authority indicates that the warrant requirement applies provided that the individual is not aware that she is in the presence of the police. *See City and Borough of Juneau v. Quinto*, 684 P.2d 127, 129 n.7 (Alaska 1984).

In Linda Cowles' case, without obtaining a search warrant, the police installed a video camera in the ceiling above Cowles' desk at her place of employment. The police then proceeded to silently videotape Cowles' conduct as observed from that intrusive vantage point. Since the police did not obtain a warrant, the resulting videotape and any "poisonous fruit" thereof such as Grand Jury Exhibits 3 and 4 (Exhibit C; Exhibit D) must be suppressed under *Glass* and its progeny. Should any question remain, Cowles would add that numerous Courts, both State and Federal, have held that such videotaping falls within the ambit of the Fourth Amendment's warrant requirement. *See United States v. Koyomejian*, 970 F.2d 536, 541-42 (9th Cir. 1992) (En Banc); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1436-39 (10th Cir. 1990); *United States v. Cyevas-Sanchez*, 821 F.2d 248, 250-52 (5th Cir. 1987); *Ricks v. State*, 537 A.2d 612, 616-18 (Md. 1988); *People v. Derek*, 308 N.W.2d 652, 654-55 (Mich. App. 1981); *People v. Teicher*, 422 N.E.2d 506, 439 N.Y.S.2d 846, 851-55 (Ct. App. 1981). The same and even greater protections against warrantless searches exist under the expansive privacy protections of Article I, §§ 14 and 22 of the Alaska Constitution. *Glass*, 583 P.2d 874-881.

Furthermore, because of the vantage point of the videotape and its entire absence of sound, the videotape is incomplete and misleading, leaving jurors open to

speculation as to the meaning and intent of the actions depicted. Thus, the videotape is not relevant and even if it possessed some degree of relevancy, any relevance is outweighed by the videotape's prejudicial impact. For this reason as well, the videotape should be suppressed. *See* Evidence Rules 401-403; *cf. Suiter v. State*, 785 P.2d 28, 33 (Alaska App. 1989) ("The court may admit into evidence partially audible tape recordings of the probative value of the evidence outweighs the potential for unfair prejudices and if the inaudible portions of the [tape /s/ RJ] are not so substantial that the recording is unreliable."); *see also People v. Morgan*, 535 N.Y.S.2d 97, 98-99 (A.D. 1988) (error for trial court to admit inaudible videotape where jury would be placed in position of having to speculate as to videotape's contents).

II. SUPPRESSION OF THE PURPORTED CONFESSION AND OTHER INFORMATION OBTAINED DURING THE INTERROGATION OF LINDA COWLES.

As to Linda Cowles' purported confession to the police, the entire interrogation of Cowles occurred in a custodial context where Cowles was whisked from her work area by the police and transported to the police facility on campus. Once at the police facility, even though Cowles initially denied taking any money, the police confronted Cowles concerning the videotape and persisted in interrogating Cowles for several hours, eventually obtaining from Cowles, *inter alia*, some incriminating statements as well as information concerning Cowles' bank accounts. Even when Cowles expressed a desire to leave, the police refused Cowles' request and continued

the interrogation. In view of the totality of the circumstances, a custodial situation existed and since the police failed to advise Cowles of her Miranda rights, any statements Cowles may have made must be suppressed. *See Hunter v. State*, 590 P.2d 888, 892-901 (Alaska 1979). Furthermore, since the interrogation was the product of the illegal videotaping, the interrogation itself is a fruit of the poisonous tree and must be suppressed for that reason also. *See Lindsay v. State*, 698 P.2d 659, 662 (Alaska App. 1985); *cf. Dezek, supra*, 308 N.W.2d at 657-58.

In addition, during the interrogation, the police appeared to play upon Cowles' concern with retaining her job and at one point promised Cowles that she would not be prosecuted and would not lose her job if she would admit to having taken money from the University. While such police promises are not binding on the District Attorney's office, any incriminating statements and information provided by Cowles subsequent to the police promises must be suppressed. *See Green v. State*, 857 P.2d 1197, 1201 (Alaska App. 1993).

III. SUPPRESSION OF THE EVIDENCE OBTAINED PURSUANT TO THE SEARCH WARRANTS.

As to the various search warrants themselves, the search warrants were obtained based upon the evidence gathered via the videotape and the interrogation of Linda Cowles. As such, the search warrants themselves and the evidence obtained pursuant thereto are the fruits of the poisonous tree and must likewise be suppressed. *See Lindsay, supra*, 698 P.2d at 662.

IV. DISMISSAL OF THE INDICTMENT.

As an examination of the grand jury transcript reveals, once the illegally gathered evidence is suppressed in this case, there is no evidence whereby an indictment against Linda Cowles could issue, and even if there were, the improper evidence appreciably affected the outcome of the proceedings. *See Arnold v. State*, 751 P.2d 494, 496-97 (Alaska App. 1988). Nonetheless, the State may maintain that there was testimony before the Grand Jury concerning a $5,700 financial discrepancy as evidenced at page 20 of the Grand Jury transcript and at Exhibit 2 presented to the Grand Jury. For one, such evidence does not link the purported discrepancy to Linda Cowles. Moreover, as demonstrated by Exhibit 2 before the Grand Jury, the $5,700 "discrepancy" is pure nonsense and results from a mistaken and misleading attempt to compare apples and oranges.

An examination of Grand Jury Exhibit No. 2 reveals the error. *See* Exhibit E. As Grand Jury Exhibit No. 2 indicates, the categories utilized to calculate the "Tix Sale Total" of $23,301 and the categories utilized to calculate the "Theater Report Totals" of $29,001 do not completely overlap and do not taken [sic] into account monies from "Tours." The absurdity of the situation is particularly evident when one examines the paper difference between the Tix Sale Total of $1,755 and the Theater Report Total of $7,756 for Xmas Carol. This difference of $6,001 is itself greater than the purported paper discrepancy of $5,700. For all intents and purposes, the matters evidenced by Exhibit 2 no more demonstrate theft – much less $5,700 of theft – than would be demonstrated by taking one piece

of paper and writing the number "13" on it and then taking another piece of paper and writing the number "6" on it and then stating that the bookkeeping indicates a discrepancy of "7.".

CONCLUSION

For the reasons stated, Linda Cowles' motion should be granted. Cowles respectfully prays that the Court so order.

DATED this 13th day of November, 1995, at Fairbanks, Alaska.

LAW OFFICE OF ROBERT JOHN

By: /s/ Robert John
Robert John
ABA #9011069
Attorney for Linda Cowles

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA, Plaintiff, vs. LINDALEE COWLES, Defendant.	)	(Filed Dec. 7, 1995)

No. 4FA-S95-2145 CR

REPLY TO STATE'S OPPOSITION TO MOTION TO SUPPRESS VIDEOTAPE, SUPPRESS DEFENDANT'S STATEMENTS, SUPPRESS SEARCH WARRANTS, AND DISMISS INDICTMENT

CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

Comes now Defendant Lindalee Cowles ("Linda Cowles"), by and through her counsel Robert John, and hereby files her Reply to the State's Opposition to Motion to Suppress Videotape, Suppress Defendant's Statements, Suppress Search Warrants and Dismiss Indictment.

DISCUSSION

I. the Illegality of the Warrantless Videotaping of Linda Cowles

None of the case cited by the State refute the cases cited by Linda Cowles that the videotaping of her actions from the "bird's eye view" on the ceiling required a warrant under the Alaska and federal Constitutions. The evidence adduced at the evidentiary hearing will demonstrate that Linda Cowles has a reasonable expectation of privacy against such an intrusion. Moreover, Cowles would refer the Court to the case of *State v. Bonnell*, 856 P.2d 1265 (Hawaii 1993) (copy attached) where the Hawaii Supreme Court held that the covert, warrantless video surveillance of a public employee for the purposes of acquiring evidence for a criminal prosecution violates the constitutional guarantees against unreasonable searches and seizures. At least the same protections should apply under the stringent privacy safeguards embodied in Article I, §§ 14 and 22 of the Alaska Constitution. *See State v. Glass*, 583 P.2d 872, 876-81 (Alaska 1978).

II. The Suppression of Linda Cowles' Statements to the UAF Police

The State's opposition appears to address only the *Miranda* issue raised by Linda Cowles. Apparently, the State then concedes the merit of Cowles' claim under *State v. Green*, 857 P.2d 1197, 1201 (Alaska App. 1993).

As to the *Miranda* issue itself, the evidence will demonstrate that Linda Cowles was subjected to a custodial

interrogation from the outset. While the failure to record such interrogation necessarily requires suppression of Cowles' statements under *Stephan v. State*, 711 P.2d 1156 (Alaska 1985), if any tapes or parts thereof which record the interrogation are of such poor quality so as to not be of assistance to the Court in ruling on the motion, the Court must presume that the tapes would be favorable to Cowles' position and must accept Cowles' version of events should there be a "swearing contest" between Cowles and one of [sic] more of the testifying officers. *Thorne v. Dept. of Public Safety*, 774 P.2d 1326, 1330-31 & n.12 (Alaska 1989).

In addition, the State is mistaken in its contention that the *Hunter* test for a custodial interrogation is no longer applicable. As the Alaska Court of Appeals explains in *Edwards v. State*, 842 P.2d 1281, 1284 (Alaska App. 1992) (copy attached), the *Hunter* test is alive and well in Alaska.

III. Suppression of the Search Warrant Evidence

At page 4 of the Opposition, the State appears to concede that if the videotape and Linda Cowles' statements are suppressed, there is insufficient evidence for search warrants 95-109, 95-110, 95-111, 95-112 and 95-128 to have issued. The State nonetheless maintains that regardless of the suppression of the videotape and Cowles' statements, search warrants 95-98 and 95-99 should be upheld.

The search warrant materials are attached hereto as Exhibit F. As a review of the log notes for search warrants

95-98 and 95-99 indicates, the predominate evidence presented was that which was illegally obtained. Thus, search warrants 95-98 and 95-99 must be suppressed as well since there was no probable cause absent the illegally obtained evidence and if probable cause had existed, the magistrate's decision was affected by the improper evidence. *See Mathis v. State*, 778 P.2d 1161, 1166 (Alaska App. 1989).

IV. Dismissal of the Indictment

Linda Cowles maintains that when the illegally seized evidence and the poisonous fruits thereof are excised from the evidence presented to the Grand Jury, there is plainly insufficient evidence for an indictment to have issued. Moreover, even if the sketchy evidence that remained were sufficient, in and of itself, to justify an indictment, that evidence is so weak that the much stronger, yet improper, evidence must be said to have appreciably effected the outcome of the proceedings, thus requiring dismissal of the indictment. *Arnold v. State* 751 P.2d 494, 496-97 (Alaska App. 1988).

CONCLUSION

For the reasons stated, Linda Cowles' motion must be granted and the indictment must be dismissed. Linda Cowles respectfully prays that the Court so order.

LAW OFFICE OF ROBERT JOHN

By: /s/ Robert John
Robert John/ABA#9011069
Attorney for Lindalee Cowles

I certify that true and correct copies of the foregoing Reply to State's Opposition were hand-delivered on this date to:

Office of District Attorney

By: YNC Date: 12/6/95

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,
Plaintiff,
vs.
LINDALEE COWLES,
Defendant.

No. 4FA-S95-2145 CR

CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO SUPPRESS VIDEOTAPE INTERROGATION, AND SEARCH WARRANTS, AND TO DISMISS INDICTMENT

(Filed Mar. 12, 1996)

COMES NOW Defendant Lindalee Cowles, by and through her counsel Robert John, and pursuant to Criminal Rule 42(k), hereby requests that the Court reconsider its January 11, 1996 Order Denying Motion to Suppress

Videotape, Interrogation, and Search Warrants, and to Dismiss Indictment. Specifically, reconsideration is sought under Criminal Rule 42(k)(1)(D) in that "the law applied in the ruling has been subsequently changed by court decision," to wit, the decision in *State v. Page*, Alaska Court of Appeals Op. No. 1458 (February 9, 1996), ___ P.2d ___ (Alaska App. 1996).

As the court may be aware, the undersigned counsel was out of state on his honeymoon starting February 9, 1996 and did not return to the office till March 4, 1996. As counsel was reviewing the appellate decisions rendered in the interim, he read the *Page* decision, prompting this motion.

At pages 5 through 7 of this Court's Order, the Court held that Lindalee Cowles did not have a reasonable expectation of privacy because, the Court concluded, members of the public may have been able to observe that Cowles was at work and co-workers interacted with Cowles during the videotaping and could possibly have observed some of the videotaped activities. Yet, in *Page* the Court of Appeals explained that the decision in *State v. Glass*, 583 P.2d 872 (Alaska 1978) "is premised on the legal rule that people who knowingly reveal private matters to other occupants of a room are nonetheless entitled to expect that these private matters are not being simultaneously broadcast to other locations or electronically recorded for later scrutiny." *Page*, at 6; *see also id.* at 6 n.2 (although a person in a public restroom cannot expect absolute privacy from the observations of other persons in the restroom, the person can certainly expect privacy from "clandestine peeping").

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Moreover, had Lindalee Cowles' co-workers been police informants or otherwise consented to warrantless audiotaping of their work environment with Cowles, such warrantless audiotaping would itself have been unconstitutional. *Glass*, 583 P.2d at 877-80. Since the warrantless videotaping of Cowles' work environment has the same corrosive impact on the individual's sense of security, such videotaping is also unconstitutional. *Page*, at 3, 5-8.

Whereas the defendant in *Page* was engaged in a commercial transaction occurring at someone else's property with which he had no other connection, *see Page* at 2, 7, Lindalee Cowles was videotaped in the work location which she occupied every day. Given such circumstances, Lindalee Cowles – even more so than the defendant in *Page* – "could reasonably expect that [her] activities would not be observed by anyone except onlookers whose presence [s]he was aware of." *Page*, at 8.

In conclusion, the Court should reconsider its decision in view of *Page* and should accordingly hold that the warrantless, clandestine videotaping of Lindalee Cowles is unconstitutional. Since the issuance of the search warrants, the interrogation of Lindalee Cowles, and the Grand jury proceedings were all prompted by nd [sic] followed from the clandestine videotaping, Lindalee Cowles original motion should be granted in full, and the Indictment must thus be dismissed.

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DATED at Fairbanks, Alaska this 12th day of March, 1996.

LAW OFFICE OF ROBERT JOHN

By /s/ Robert John
Robert John/ABA#8911069
Attorney for Lindalee Cowles

:mld

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IN THE COURT OF APPEALS
FOR THE STATE OF ALASKA

LINDALEE COWLES,	)	
	)	
Appellant,	)	No. A-06381
vs.	)	Case No. 4FA-S95-2145 Cr.
STATE OF ALASKA	)	
	)	
Appellee.	)	
	)	

ON APPEAL FROM THE SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT
THE HON. RALPH R. BEISTLINE, PRESIDING

OPENING BRIEF OF APPELLANT

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VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

FILED IN THE APPELLATE COURTS FOR THE STATE OF ALASKA THIS 19th DAY OF MAY, 1997.

JAN HANSEN
CLERK OF THE APPELLATE COURTS
BY: /s/ Cheryl Jones
DEPUTY CLERK, APPELLATE COURTS

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ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS VIDEOTAPE INTERROGATION, AND SEARCH WARRANTS, AND TO DISMISS INDICTMENT AND HER MOTION FOR RECONSIDERATION OF THAT ORDER.

A.

Standard of Review for Motion to Suppress

The issues in a suppression motion generally raise "questions of law and fact." *Tagala v. State*, 812 P.2d 604, 607 (Alaska App. 1991). The trial court's factual findings concerning the validity of a warrantless search are reversible if they are clearly erroneous. *Id.*, *Hilbish v. State*, 891 P.2d 841, 948 (Alaska App. 1995).

The issues of whether the UAF police were required to secure a warrant before surreptitiously videotaping appellant, whether the interrogation tape and the evidence received pursuant to the search warrants were subject to the exclusionary rule, and whether appellant was in custody such that she was entitled to *Miranda* warning are questions of law subject to *de novo* review. *State v. Page*, 911 P.2d 513, 515 (Alaska App. 1996), *petition for hearing, dismissed*, ___ P.2d ___, Op. No. S-7555 (Alaska, March 3, 1997); *Johnson v. State*, 919 P.2d 767, 769 (Alaska App. 1996); *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979). Upon *de novo* review, this court must decide the issue independently without deference to the trial court's decision. *Id.*; *Coleman v. State*, 846 P.2d 141, 142 (Alaska App. 1993).

B.

Discussion of Motion to Suppress

1.

The Trial Court Erred in Refusing to Suppress the Surveillance Videotape of Appellant

The trial court denied both appellant's motion to suppress videotape and her motion for reconsideration based upon *State v. Page*, 911 P.2d 513, 515 (Alaska App. 1996), *petition for hearing, dismissed*, ___ P.2d. ___, Op. No. S-7555 (Alaska, March 3, 1997). [R. 4; R. 25]. While the trial court found that Ms. Cowles had a subjective expectation that she would not be surreptiously videotaped by police while working in her office, it held that under the "open view" doctrine, her expectation of privacy while doing a "public undertaking" in a "public place" in a "public building" was not one that society would recognize as reasonable. [R. 3-4; R. 23-25]. Specifically, the court viewed her office space as "public" merely because co-workers and visitors in her office and members of the public in Great Hall, peering through the box office window, could see her at her desk. [R. 3; R. 24-25]. Finally, upon reconsideration, the trial court interpreted this court's decision in *Page* to be inapplicable beyond a private house or apartment setting. [R. 4].

Upon *de novo* review, it is clear that the trial court's legal analysis is erroneous. The trial court erred in the manner in which it applied the second prong of the *Glass/Page* analysis, refused to follow the holding of *Page*, decided this case based upon the "open view" doctrine. [R. 3-4; R. 22-25].

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In *Glass v. State*, 583 P.2d 872, 881 (Alaska 1978), the Alaska Supreme Court held that the police must obtain a warrant before surreptitiously recording a person's conversations. Recently, in *State v. Page*, 911 P.2d 513, 515 (Alaska App. 1996), *petition for hearing, dismissed*, ___ P.2d. ___, Op. No. S-7555 (Alaska, March 3, 1997), this court extended the *Glass* warrant requirement to surreptitious videotaping of a person's activities during a drug transaction with an undercover police informant in an apartment. *Page*, 911 P.2d at 515-517. Similarly, before the UAF police were entitled to surreptitiously videotape Ms. Cowles working at her desk in her office, they first should have obtained a *Glass* warrant.

"In *Glass*, the Alaska Supreme Court adopted a two-pronged test to be employed when construing the scope of a privacy granted by Article I, Sections 14 and 22 of the Alaska Constitution." *Page*, 911 P.2d at 515. Under these sections of the state constitution, a person is protected from unreasonable governemental [sic] intrusion whenever (1) the person manifests a subjective expectation of privacy in the property or activity being subjected to government scrutiny, and (2) this expectation is one that society recognizes as reasonable." *Id., citing, Glass*, 583 P.2d at 875, 880.[13] As noted above, the trial court found the first prong: that Ms. Cowles had a subjective belief

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[13] This test is derived from the *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 LEd.2d 576, 588 (1976). A person with a reasonable expectation of privacy in an area or of an activity, they may not be searched in that area or while engaged in that activity by the government without a warrant. *Id.; Page*, 911 P.2d at 517; *Glass*, 583 P.2d at 881.

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that her activities at her office at the UAF Theatre Department box office would be private and not subject to surreptitious electronic video monitoring and taping. [R. 23].

This legal question presented here is whether that Ms. Cowles' expectation of privacy was one that society would accept as reasonable. *Page*, 911 P.2d at 515. "The answer to this second prong of the test rests on constitutional intent and, ultimately, on a judgment concerning the proper balance to be struck between the rights of the individual and the authority society exercises over individuals through the agency of the government." *Id.*, 911 P.2d at 515-516.

In this case, Ms. Cowles had some expectation of that she, while seated at her desk in her office, engaged in work activities, would not be visually broadcast and monitored by a video camera overhead without her awareness or her consent. The trial court never addressed this precise issue, focussing on the fact that Ms. Cowles was in an office where she had some contact with co-workers, faculty, students, the public during business hours. [R. 23-25]. Yet, the fact that Ms. Cowles was not locked in her office alone, does not prevent her from having a reasonable expectation of privacy to not be observed, monitored and videotaped by unseen onlookers. As this court recognized in *Page*, 911 P.2d at 516-517, because Page knew his conduct could be visually observed by the undercover officer[14] he invited to the

[14] Given that this case does not involve the third party consent to the videotaping by an undercover informant, this

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apartment and any other onlookers at the crack house, he could not reasonably expect "complete visual privacy inside the apartment." despite this, "people who knowingly reveal private matters to other occupants of a room are . . . entitled to expect that these private matters are not being simultaneously broadcast to other locations or electronically recorded for later scrutiny." *Id.*, 911 P.2d at 516.

Courts in other jurisdictions, where citizens are not necessarily afforded as firm and broad a constitutional privacy protection as Alaskans, still have recognized a reasonable expectation that public employees at their workplaces will be not be subjected to warrantless, covert video surveillance by the police conducting a criminal investigation. *United States v. Takata*, 923 F.2d 665, 675 (9th Cir. 1991); *State v. Thomas*, 642 N.E.2d 240, 248-249 (Ind. App. 1994); *State v. Bonnell*, 856 P.2d 1265, 1277 (Hawaii 1993).[15] It is also noteworthy that not only have law

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case demonstrates an even greater objective expectation of privacy.

[15] Similarly, in *People v. Arno*, 153 Cal. Rptr. 624, 627-628, 90 Cal. App.3d. 509, 511-512 (Ca. App. 1979), the Second District Court of Appeals for California held that where a police officer, in another building, was only able to observe the defendant distributing obscene films from his office by looking through ten-power binoculars, the evidence obtained from that warrantless surveillance had to be suppressed as the defendant had a reasonable expectationt [sic] that he would not be so observed. Because Officer Brown was able, through the use of the videocamera, to observe Ms. Cowles from an angle (from the ceiling, over her head and desk) she could reasonably expect to be observed, his warrantless video surveillance and the fruits of that surveillance should likewise have been suppressed as evidence. [Tr. 27-28; 44-45; 3990-400].

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enforcement officers in other jurisdictions routinely obtained warrants before engaging in surreptitious video surveillance of suspects at their offices, but also, the courts, citing the extreme intrusiveness of videotaping, have required evidence of four findings in addition to probable cause before upholding these warrants. *See, United States v. Koyomejian*, 970 F.2d. 536, 541-542 (9th Cir. 1992); *United States v. Mesa-Rincon*, 911 F.2d 1433, 1439-1445 (10th Cir. 1990); *United States v. Biasucci*, 786 F.2d 504, 510 (2nd Cir. 1986); *United States v. Andonian*, 735 F.Supp 1469, 1478 (C.D. Ca. 1990); *United States v. Ianniello*, 621 F. Supp. 1455, 1466-1468 (S.D. NY 1985); *People v. Teicher*, 422 N.E.2d 506, 514-515 (NY App. 1981).

In *Takata*, 923 F.2d 668-689, state agent Takata and federal agent O'Brien, who worked in two small attached offices in an airport facility maintained by the Drug Enforcement Agency ("DEA"), were convicted of intercepting telephone conversations illegally with a modified pen register. In the course of investigating Takata and O'Brien for these criminal acts, DEA agents obtained a master key from the supervisor of the airport facility to determine the feasibility of installing video surveillance equipment the next time the office was authorized to operate a pen register. *Id.*, 923 F.2d at 668. Once the office was authorized, the DEA agents forced the lock and entered O'Brien's office, photographed the scene, removed and copied the illegal covert audio tape, and installed a hidden video camera in the ceiling of the office aimed at the pen register. *Id.*, 923 F.2d at 669. Thereafter, the DEA agents entered the office again to replace tapes in the surveillance camera and to execute a search warrant of O'Brien's and Takata's personal and business

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items. *Id.* When O'Brien and Takata moved to suppress this evidence based upon the Fourth Amendment, the trial court denied that motion. *Id.*

The Ninth Circuit found that O'Brien had a reasonable expectation of privacy in his office. *Id.*, at 673. The Court explained that "the privacy analysis does not turn on property rights" to the government office; instead, an employee may have a privacy interest in his office, beyond his personal effects if he meets the *Katz* test of "a subjective expectation of privacy that is objectively reasonable." *Id.*, 923 F.2d at 672. Additionally, the *Takata* Court emphasized that no "established regulatory scheme or specific office practice defeated that expectation" of privacy. *Id.*

In rendering this conclusion, Ninth Circuit rejected the federal government's contentions[16] that the downtown DEA offic[illegible]c's [sic] possession of a master key to the airport office and the access of other airport DEA employees to O'Brien's office defeated his privacy expectations. *Id.* Regarding the former, the Court noted that "allowing the existence of a master key to overcome the expectation of privacy would defeat the legitimate privacy interest of any hotel, office or apartment occupant." *Id.* Concerning the latter, the Court explained that:

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[16] The Ninth-Circuit also found meritless the federal government's even weaker claims that O'Brien's expectation of privacy in his office was defeated by his failure to shut and lock his door at all times; the goverment's [sic] theoretic need to inspect offices to inventory employee's offices, which was never put into practice; and the consent of the DEA supervisor in charge of the investigation. *Takata*, 923 F.2d at 673.

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> Privacy does not require solitude. As *O'Connor*[17] recognized, even 'private' business offices are often subject to the legitimate visits of co-workers, supervisors, and the public without defeating the expectation of privacy unless the office is 'so open to fellow employees or the public that no expectation of privacy is reasonable.' . . . O'Brien's office was not open to the public, and was not subjected to regular visits of inspection by DEA personnel. The only people to have regular assess to it were the three agents stationed at the airport. The assess of others does not defeat O'Brien's expectation of privacy in his office. [citations omitted].

Id.

The Ninth Circuit went on to consider whether the video surveillance of O'Brien (who had a reasonable expectation of privacy in his office) and Takata (who did not have a reasonable expectation of privacy in O'Brien's office) had reasonable privacy expectations that they would not be videotaped in O'Brien's office by government agents searching for evidence of criminal conduct. *Id.*, 923 F.2d at 674-675. The Court found that both agents' expectation that they would not be videotaped by government officials while working in O'Brien's office was reasonable. *Id.* In so doing, it emphasized that suppression was required because the purpose of the warrantless video surveillance was to obtain evidence of a crime for a criminal prosecution (as opposed an internal investigation into work-related employee misconduct in order to

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[17] This cite refers to *O'Conner* [sic] *v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1981).

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taken employment action) and because video surveillance is exceptionally intrusive. *Id.*, 923 F.2d at 675-677.

Similarly, in *State v. Thomas*, 642 N.E.2d 240, 242-243, 247, the Indiana Court of Appeals held that the warrantless, covert video surveillance by the State of Indiana, Department of Natural Resources ("DNR") of Thomas' cash register area in a campstore in a state park that he licensed from DNR was an illegal search and upheld the trial court's decision suppressing all evidence derived form that search. The license and concession agreement between Thomas and DNR gave DNR some authority over operations and management of the campstore and required Thomas to maintain the campstore, supervise the business, operate the business according to law, and pay DNR a monthly fee. *Id.*, 642 N.E.2d at 242. DNR conservation officials[18] were called upon to investigate a complaint that Thomas was not ringing up sales at the campstore and thereby improperly withholding that percentage of revenue from DNR. *Id.* They obtained a master key for the campstore from the DNR property manager and made several entries into the campstore. During one entry, the conservation officials "drilled a hole in the ceiling and installed and aimed the video cameras 'strictly over the cash register.' " *Id.*

The DNR conservation official then timed the videocamera to record the activities near the cash register of the campstore during business hours. *Id.* They collected

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[18] Under Indiana statute, these "conservatiion officials" were considered law enforcement officers. *Thomas*, 642 N.E.2d at 242, n. 4.

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and reviewed the videotapes that showed that the campstore took in significantly more revenue than Thomas reported. *Id.*, 642 N.E.2d at 243. Upon confronting Thomas and his employees, the conservation officials obtained more incriminating evidence and charged Thomas with two counts of theft. *Id.* Thomas' motion to suppress the videotapes and the subsequent incriminating statements was granted by the trial court. *Id.*

The Indiana Court of Appeals agreed with Thomas and the trial court that his subjective expectation of privacy not to be surreptitiously videotaped in the campstore that he had licensed was objectively reasonable. *Id.*, 642 N.E.2d at 246. On appeal, the state argued that Thomas had no reasonable expectation of privacy that he would not be videotaped on his licensed premises during business hours in a place open, visible and accessible to the public. *Id.*, 642 N.E.2d at 244. However, the *Thomas* court rejected that "open view" argument, noting that the issue could not be "resolved simply by a determination that the scope of the surveillance was limited to the observation of transactions conducted during business hours in a public place." *Id.*, 642 N.E.2d at 244-245. Rather, in addition the issue of "ownership and possession" to other factors: "(1) the surreptitious means by which the video surveillance was accomplished, including the location of the equipment and the method utilized to place it there, and (2) the degree of intrusion inherent in the continuous nature of video surveillance" must be evaluated as well. *Id.*, 642 N.E.2d at 244.

In applying these factors, the Indiana Court of Appeals found that while Thomas did not have an absolute expectation of privacy in the entire concession area,

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"he had a right of possession to the campstore superior to that of the general public," which only had a limited right of access for the purpose of conducting business. *Id.*, 642 N.E.2d at 245. It also reasoned that "DNR's right to audit and inspect the concession did not render the area public for all purposes and confer upon it a right to invade the licensed area after business hour, install hidden video equipment and conduct video surveillance." *Id.*

As to the second factor, the *Thomas* court noted that covert "video surveillance has been recognized to be one of the most intrusive forms of searches performed by the government, regardless of the type of premises searched." *Id.* Video surveillance under society's lens:

> . . . produces an immediate negative visceral reaction and raises the spectre of the Orwellian state . . . television surveillance in criminal investigations was 'reminiscent of the 'tele-screens' by which 'Big Brother' in George Orwell's 1984 maintained visual surveillance of the entire population of 'Oceania,' the miserable country depicted in that anti-utopian novel . . .' . . . We, too, believe that video surveillance is 'exceedingly intrusive . . . and inherently indiscriminate, and this could be grossly abused – to eliminate personal privacy as understood in modern Western nations.' [citations omitted].

Id.

The court in *Thomas*, ruled that the state's reliance upon the "open view" doctrine was misplaced because that doctrine pertains only to situations in which the observation takes place from a non-intrusive vantage point. *Id.* In *Thomas*, the court found that the "video

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surveillance conducted by the DNR's conservation officers occurred from a grossly intrusive vantage point, the campstore's attic and ceiling, which was an area not accessible to the public in open view." *Id.* Thus, "[w]hatever the general privacy interests Thomas may or may not have had inside the campstore, he had an actual, subjective and reasonable expectation of privacy against being videotaped from overhead [at a non-public vantage point] during a four day period." *Id.*, 642 N.E.2d at 246. After weighing all three factors, the Indiana Court of Appeals affirmed trial court's suppression of evidence. *Id.*, 642 N.E.2d at 246-247.

Next, in *State v. Bonnell*, 856 P.2d 1265, 1270, 1279 (Hawaii 1993), the Supreme Court of Hawaii upheld suppression of evidence obtained as a result of warrantless, covert video surveillance of postal workers in the post office break room in the course of a criminal investigation of illegal gambling. *Id.*, 856 P.2d at 1270. Based upon two anonymous letters alleging that illegal gambling was taking place at the downtown Lahaina post office, a postal inspector and the local police covertly installed videocamera in four areas of that post office (including one placed the smoke detector in the break room which focused on the break room table), in order to conduct covert surveillance of postal workers. *Id.* After one year of surreptitious, warrantless videotaping during regular work hours, the videotape showed a small amount of gambling activity. *Id.*, 856 P.2d. at 1271. With that evidence, the defendants were charged, but prevailed on motions to suppress that evidence. *Id.*, 856 P.2d at 1271-1272.

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Again, in evaluating the reasonableness of the defendant's expectation of privacy, the Hawaii Supreme Court considered the " 'the nature of the area involved, the precautions taken to insure privacy.' " . . . " and the 'type and character of [the] governmental invasion' employed." *Id., citing, State v. Barnett*, 703 P.2d 680, 684 (Hawaii 1985). The *Bonnell* court found that the employee break room "was neither a public place or subject to public view or hearing," because only postal employees and invited guests were allowed in the room and anyone seated in the break room "could see anyone approaching and could avoid being surprised by an untrusted intruder." *Id.*, 856 P.2d at 1276.

As in *Thomas*, the Court in *Bonnell* explained that the observation of the videocamera surveillance did not constitute "open view" observation by a governmental agent from a non-intrusive vantage point, either "on the outside looking outside, or on the outside looking inside [at] that which is knowingly exposed to the public." *Id., citing, State v. Kaaheena*, 575 P.2d 462, 466-467 (Hawaii 1978). To the contrary, this case involved "yearlong observations, from the 'inside looking inside' of a smoke detector-obscured 'seeing eye' video camera occupying a grossly intrusive vantage point and targeting activity that by no stretch of the imagination can be regarded as having been knowingly exposed to the public." *Id.* Finally, the Court, citing *Takata*, ruled that the governmental invasion by this video surveillance was "exceedingly intrusive . . . inherently indiscrimiante" with a potential for gross abuse. *Id.*, 856 P.2d at 1277. Accordingly, the *Bonnell* court, too, held that the defendants had a reasonable expectation that, while in their break room, they would not be

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covertly videotaped by police officers conducting a criminal investigation. *Id.* Thus, it agreed that this warrantless search was unreasonable and affirmed suppression of the evidence obtained from the search. *Id.*, 856 P.2d at 1279.

Applying the criteria utilized by the courts in *Takata*, *Thomas*, and *Bonnell* cases to the instant case, the warrantless, covert video surveillance of Ms. Cowles at her desk violated her reasonable expectation of privacy. First, even though Ms. Cowles did not have an absolute expectation of privacy in her office, it did not mean that society would grant her no expectation of privacy in her office. Her expectation of privacy in her office was not defeated merely because it had a window and was legitimately accessible during business hours to student employees, supervisors and invited guests. *Takata*, 923 P.2d at 673; *Thomas*, 642 N.E2d at 244; *Bonnell*, 856 P.2d at 1276. [Tr. 17; Tr. 20-25; Tr. 85-89; Tr. 96; Tr. 308; Tr. 313; Tr. 363].

In spite of this circumscribed accessibility, the UAF Theatre Department box office was not a common area for all purposes at all time. [Tr. 17; Tr. 20-25; Tr. 85-89; Tr. 96; Tr. 308; Tr. 313; Tr. 363]. Only during business hours when the roll-down window was up, could a customer come to window to purchase a ticket. [Tr. 17; Tr. 20; Tr. 85; Tr. 89; Tr. 308]. Customers never went inside Ms. Cowles' office to purchase tickets. [Tr. 17-18]. In fact, a person could only get into Theatre Department box office if he or she knew the door's combination lock, that was changed regularly and known only to Ms. Cowles, student employees, and members of the Theatre Department. [Tr.

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24-25; Tr. 85; Tr. 313; Tr. 363]. In sum, Ms. Cowles office was simply not a "public" place.[19]

In sharp contrast, Ms. Cowles had a right of access to her office at any time and the right and obligation to secure the office, by closing the window and locking the door, from intruders in her absence. [Tr. 85; Tr. 89; Tr. 96; Tr. 313; Tr. 363]. *Thomas*, 642 N.E.2d at 245. When seated at her desk, Ms. Cowles could see anyone approaching and could avoid being surprised by an untrusted onlooker. [Tr. 86-87]. *Bonnell*, 856 P.2d at 1276.

And, even assuming her privacy interest in her office was unreasonable, Ms. Cowles still retained an interest in not having her person be the object of video surveillance and broadcasting. *Takata*, 923 F.2d at 665. The Fourth Amendment governs persons from unlawful, surprise government intrusion, not places. *Katz*, 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588 (1976).

Significantly, the trial court's reliance upon the "open view" doctrine equally is misplaced in this case as in *Thomas* and *Bonnell*. Just as in those cases, the video camera's observation of Ms. Cowles took place from the same highly intrusive vantage point, the ceiling pointed almost directly over her desk. [Tr. 27-28; Tr. 44-45; Tr. 399-400]. The video surveillance was not comparable to observations coming from Great Hall looking inside her office through a window or door. Rather, the ventilator-

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[19] Great Hall, too, had specific hours during which time it was open to the traffic of student, faculty and members of the public. [Tr. 362; Tr. 388]. It was locked from 10 p.m. until morning. [Tr. 362; Tr. 388]. It was not a great, unlimited public thoroughfare portrayed by the trial court.

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obscured video camera, planted in the ceiling inside her office, aimed directly over her head and desk, was located in the most invasive vantage point from which it recorded activity that could never be construed to be knowingly exposed to the public. [Exhibit 9]. Like the video surveillance from the ceiling over the cash register in *Thomas*, 642 N.E.2d at 245, the video surveillance from the ceiling over Ms. Cowles' desk watched an area not accessible to the public in open view from a "grossly intrusive vantage point." Ms. Cowles, like Mr. Thomas, had "an actual, subjective and reasonable expectation of privacy against being videotaped [and monitored by police] from this non-public vantage point." *Id.*, 642 N.E.2d at 246.

Further, it had been generally established that video surveillance is "one of the most intrusive forms of searches performed by the government, regardless of the type of premises searched." *Thomas*, 642 N.E.2d at 245; *See also, Takata*, 923 F.2d at 677; *United States v. Cuevа-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987); *United States v. Torres*, 751 F.2d 875, 877, 882, 885 (7th Cir. 1984); *Bonnell*, 856 P.2d at 1276-1277. Its qualities include extreme intrusiveness, inherent indiscriminateness, with a potential for gross abuse by eliminating personal privacy. *Thomas*, 642 N.E.2d at 245, *citing, Torres*, 751 F.2d at 882.

Finally, like the DEA in *Takata*, 923 F.2d at 672, UAF had established no employee regulations or policies to forewarn employees such as appellant that they would be subject to warrantless video surveillance on the job, and it had established no regular, specific office practices of conducting such surveillance to defeat her reasonable expectation of privacy against such surveillance. In the

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same vein, the record undisputed that the video surveillance of Ms. Cowles was instituted by the UAF police as a part of their criminal investigation, targeting her for theft, after the internal audit had been concluded. [Tr. 17-23; 395-396; R. 424-428].

To summarize, the trial court erred in ruling, as a matter of law, that Ms. Cowles' expectation of privacy against being surreptitiously, almost continuously monitored and videotaped for four hours by a camera in the ceiling pointed directly over her desk by the UAF police in the course of their investigation was not reasonable. Clearly, the *Glass, Page, Takata, Thomas* and *Bonnell* cases demonstrate that her expectation of privacy based upon the record was reasonable. As such, the warrantless video surveillance violated Article I, Section 14 and 22, and the fruits of that search should have been suppressed as evidence.

* * *

CONCLUSION

The trial court erred in not granting the appellant's motion to suppress videotape, interrogation, search warrants and motion to dismiss indictment. As such, Ms. Cowles' conviction and the trial court's order denying these motions should be reversed. Her case should be remanded with an order that evidence derived directly or indirectly from the videotape, her interrogation and the search warrants be suppressed and that the indictment against her be dismissed.

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Alternatively, because the trial court erred in precluding her from presenting relevant, critical testimony and in denying the motion for new trial, this court should reverse her conviction and remand her case for a new trial, with the instruction that Ms. Aronow-Brown and Ms. Scholle be allowed to testify in full as to box office change-making practices and as to the other UAF break-ins and thefts, respectively.

Finally, in the event that Ms. Cowles' conviction stands or she is reconvicted, this court should order that the restitution order be vacated and the trial court recalculate restitution based upon sufficient, substantial evidence proved by a preponderance of the evidence.

Dated at Fairbanks, Alaska, this 19th day of May, 1997.

ALASKA PUBLIC DEFENDER
AGENCY
BARBARA BRINK,
Public Defender
By:

/s/ Colleen A. Kosluchar
Colleen A. Kosluchar
Assistant Public Defender

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IN THE COURT OF APPEALS
FOR THE STATE OF ALASKA

LINDALEE COWLES,	)	
	)	
Appellant,	)	No. A-06381
vs.	)	Case No. 4FA-S95-2145 Cr.
	)	
STATE OF ALASKA	)	
	)	
Appellee.	)	
	)	

ON APPEAL FROM THE SUPERIOR COURT
FOR THE STATE OF ALASKA, FOURTH
JUDICIAL DISTRICT THE HON.
RALPH R. BEISTLINE, PRESIDING

REPLY BRIEF OF APPELLANT

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VP.A CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

FILED IN THE APPELLATE COURTS FOR THE STATE OF ALASKA THIS 30th day of Sept., 1997

JAN HANSEN
CLERK OF THE APPELLATE COURTS
By:
/s/ Cheryl Jones
DEPUTY CLERK, APPELLATE COURTS

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INTRODUCTION

In her opening brief, appellant Lindalee Cowles argued that the trial court erred in denying her motion to both suppress the warrantless surveillance videotaping of her at her desk, the audio tape recording of her interrogation, the evidence obtained through the search warrants and to dismiss indictment, as well as her motion for reconsideration of the trial court's order denying that motion to suppress and dismiss in light of *State v. Page*, 911 P.2d 513 (Alaska App. 1996), *petition for hearing dismissed*, 932 P.2d 1303 (Alaska 1997). Ms. Cowles also argued that the trial court erred at trial by excluding the probative testimony of Lea Aronow-Brown concerning

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box office practices and Marie Scholle concerning contemporaneous thefts in nearby offices. Further, appellant objected to the amount of the restitution award as being arbitrary, vague and unsupported by sufficient evidence. Finally, Ms. Cowles contended that the trial court erred in denying her motion for a new trial based upon the discovery of new accounting evidence that would have likely led to her acquittal on this charge.

In this reply brief, Ms. Cowles addresses the state's arguments raised in its appellee's brief. However, she continues to rely upon her previous arguments made in her opening brief.

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING MS. COWLES' MOTION TO SUPPRESS VIDEOTAPE, INTERROGATION, AND SEARCH WARRANTS AND TO DISMISS INDICTMENT, AND IN DENYING HER MOTION FOR RECONSIDERATION OF THAT ORDER.

A.

Motion to Suppress Evidence.

The state, in its appellee's brief, argues that the covert, warrantless overhead video surveillance and taping of Ms. Cowles working at her desk at the University of Alaska, Fairbanks ("UAF") Theatre Department box office did not constitute an unreasonable search because Ms. Cowles' subjective expectation of privacy[1] in that

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[1] The trial court found, and appellee concedes that Ms. Cowles had a subjective expectation of privacy in that her

setting was not reasonable. Appellee's Brief at 4-6. The state adopts the trial court's perfunctory conclusion that appellant's expectation of privacy in her office was not reasonable because her office was a "public place" for conduction of business and at "all relevant times open to public view." Appellee's Brief at 6-7. [R. 3-4; R. 23-25].

However, in so doing, appellee forgets that the reasonableness of that expectation of privacy presents a question of law. *State v. Page* 911 P.2d 513, 515 (Alaska App. 1996), *petition for hearing dismissed*, 932 P.2d 1303 (Alaska 1997). The state's approach for evaluating the reasonableness of a privacy interest by simply labeling the location where the privacy interest has been invaded as a "public or private area" or a "business or non-business" is wrong. Rather, the analysis "rests upon constitutional intent and ultimately, on a judgment concerning the proper balance to be struck between the rights of the individual and the authority society exercises over individuals through the agency of the government." *Id.*, 911 P.2d at 515-516.

Appellee notes generally that a person working in a business office has a lesser expectation of privacy than one does in his or her home. Appellee's Brief at 6-7. However, it is well-established in federal jurisprudence that, despite the lack of an enumerated right of privacy as found in Alaska, public employees may have reasonable expectations of privacy against intrusions in to their offices, desks, or file cabinets by police or other state

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actions in her office would be private and not monitored or taped by a video camera. Appellee's Brief at 6. [R. 12].

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employees. *O'Connor v. Ortega*, 480 U.S. 709, 716-717, 107 S.Ct. 1492, 1501, 94 L.Ed.2d 714, 722-723, *citing Mancusi v. DeForte*, 392 U.S. 364, 369, 88 S.Ct. 2120, 2125, 20 L.Ed.2d 1154, 1159 (1966). The United States Supreme Court has held that the objective reasonableness of an employee's expectation of privacy in his or her office is greater when: (1) the intrusion into the employee's office is done by a law enforcement official as opposed to a mere supervisor; (2) when access to the employee's office by co-workers, supervisors, consensual visitors and members of the public is limited in time and frequency; and (3) when there are no office practices or regulation permitting warrantless searches of employee offices. *Id.*

Applying these three factors to the present situation, it is evident that Ms. Cowles had a reasonable privacy interest in not being secretly videotaped while working in her office at her desk. The videotape search was instituted by the UAF police, under the guidance of the state District Attorney's office, in the course of their criminal investigation of her alleged theft from her employer.[2] Second, Ms. Cowles had limited access to her office, access which occurred through a door equipped with a

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[2] UAF Acting Director of Internal Audit Benny Shilling conducted an audit of the cash deposits for the UAF Theatre Department box office on March 20, 1995, the results of which were forwarded to UAF Administration officials on March 30, 1995. Those officials, on April 11, 1995 referred the information to the UAF Police Department for a criminal investigation of Ms. Cowles for theft. In the course of their investigation, UAF police installed the videocamera in the ceiling of Ms. Cowles' office on April 20, 1995 and began watching and taping her on April 25, 1995. [Tr. 17; Tr. 22-24; Tr. 27-28; Tr. 44-45; Tr. 61; Tr. 395-400; R. 424-428; R. 636-640].

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combination lock, to the part-time student employees, her supervisor and an occasional invited guest. [Tr. 19; Tr. 24-25; Tr. 85; Tr. 313; Tr. 300; Tr. 357; Tr. 363; Tr. 418]. The office itself was not open to the public; all contact with the public took place through the box office window, which was only open during posted hours. [Tr. 17-18; Tr. 20; Tr. 85; Tr. 89; Tr. 308]. Additionally, the record contains no evidence of any UAF policies or practices in effect that would have placed Ms. Cowles on notice that she, while working at her desk, was subject to random, warrantless, overhead video surveillance and taping.

Another flaw in the state's argument is that it fails to take into consideration the highly unexpected and intrusive vantage point of the video surveillance. The surveillance of Ms. Cowles at her desk was not conducted from the common area in Great Hall through either the open box office door or window, but rather, was conducted from the ceiling directly over her desk. [Tr. 27-28; Tr. 44-45; Tr. 399-400]. The "open view" doctrine, incorrectly relied on by the trial court[3] and the state, only applies when police are observing that which a person knowingly exposes to the public from a non-intrusive vantage point.

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[3] The trial court appears to also have relied on the "open fields" doctrine, its own terms in inapplicable: a person does not have a reasonable expectation of privacy in one's activities in one's land because there is "no societal interest in protecting the privacy of these activities, such as the cultivation of crops," and because these lands "are usually accessible to the public and the police in ways that a home, an office or a commercial structure would not be." *Oliver v. United States*, 466 U.S. 1709, 179, 80 L.Ed.2d 214, 224, 104 S.Ct. 1735, 1746 (1984); *See also, California v. Ciraolo*, 476 U.S 207, 217, 90 L.Ed.2d 210, 217, 106 S.Ct. 1809, 1815 (1986). [Tr. 12-13].

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State v. Thomas, 642 N.E.2d 240, 245 (Ind. App. 1994), (video surveillance by state law enforcement officials from the defendant's campstore attic and ceiling, a grossly intrusive vantage point not accessible to the public in open view, was not permissible under the "open view" doctrine); *State v. Bonnell*, 856 P.2d 1265, 1276 (Hawaii 1993) (video surveillance by police from the smoke detector in the ceiling of a postal workers' break room, a grossly intrusive vantage point targeting activity that could not have been knowingly exposed to the public, did not constitute proper "open view" observation). Thus, regardless of the expectation of privacy she had in her office, Ms. Cowles had a reasonable expectation of privacy against having her activities, that no member of the public could have seen, captured by a video camera directly overhead. *Id.*

Relatedly, the trial court's and appellee's focus on Ms. Cowles' visibility in her office to others inside and outside her office is misplaced, as it overlooks the fact that the search did not involve observation of her by police unaided by a mechanical device. Appellee's Brief at 6; [R. 12]. In *Page*, 911 P.2d at 516, this court noted that although Page "knew his conduct inside the apartment would be observed by the undercover officer . . . [and could not therefore] claim that he expected complete visual privacy inside the apartment," he was still reasonably "entitled to expect that these private matters are not being simultaneously broadcast to other locations or electronically recorded for later scrutiny." Similarly, although Ms. Cowles may have been occasionally seen in her office by a co-worker inside her office or by a passerby in Great Hall looking through the door or window to her office,

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the mere fact that she could not expect complete visual privacy in her office does not mean that she could not reasonably assume that she would not be simultaneously broadcast and videotaped from that location. If anything, Ms. Cowles expectation of privacy is more reasonable than that of Page because she was not exposed to "participant monitoring" by a police officer along with the warrantless video surveillance and tape-recording.

Next, the state goes on to claim that even if Ms. Cowles' office is not deemed a "public place," her interest in concealing her actions from her employer is not one that should be given legal recognition. Appellee's Brief at 7-8. Essentially, the state asserts that any such expectation of privacy must yield to the employer's desire and need to supervise and control Ms. Cowles' work as a public employee and to prevent or discover any workplace misconduct. Appellee's Brief at 7-8. These claims miss the point. As set forth above, the covert video surveillance and taping of Ms. Cowles was instituted and performed by the UAF Police Department, in conjunction with the state District Attorney's Office, in the course of its criminal investigation of her for theft, not by her supervisor in the course of an internal investigation of her for employee misconduct. [Tr. 17; Tr. 22-24; Tr. 61; Tr. 395-399; R. 424-428; R. 636-640]. Lastly, the state attempts to distinguish *State v. Page*, 911 P.2d 513 (Alaska App. 1996), *petition for hearing dismissed*, 932 P.2d 1303 (Alaska 1997), *United States v. Takata*, 923 F.2d 665, 675 (9th Cir. 1991), *State v. Thomas*, 642 N.E.2d 240, 248-249 (Ind. App. 1994), and *State v. Bonnell*, 856 P.2d 1265, 1277 (Hawaii 1993),

from the instant case. Appellee's Brief at 9-12.[4] This attempt, based upon misstatements and misapplication of the facts in this record, fails.

Initially, the state claims that *Page* does not control the issue of whether Ms. Cowles had a reasonable expectation of privacy not to be secretly videotaped in her office, because *Page* involved warrantless surreptitious videotaping of Page, buying drugs from an undercover officer in an apartment. *Page*, 911 at 515-516. However, as explained above, the mere fact that the covert warrantless videotaping occurs in an office instead of an apartment does not mean that appellant here had no reasonable expectation of privacy. *O'Connor*, 480 U.S. at 717, 107 S.Ct. at 1500, 94 L.Ed.2d at 723. Identification of the location of the search does not end the inquiry;[5] the circumstances surrounding the search, (including the amount and type of public access, the purpose of the videotaping and by

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[4] The state concedes that if it wrong and that the warrantless, covert videotaping of Ms. Cowles by the UAF Police Department was an unreasonable search in violation of the 4th Amendment and Article I, Sections 14 and 22, of the Alaska Constitution, the tape of her interrogation by UAF police and the evidence obtained in SW 95-98/99, SW 96-109/100/111/112 amd [sic] SW 95-128 were "fruit of the poisonous tree" and likewise must be suppressed. Appellee's Brief at 13. The state neglects to answer Ms. Cowles' alternate argument that that interrogation was obtained in violation of *Miranda v. Arizona*, 394 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). As such, she stands by the arguments made in her opening brief.

[5] The Fourth Amendment "protects people – an not simply 'areas' – against unreasonable searches and seizures . . . " *Katz v. United States*, 389 U.S. 347, 353, 19 L.Ed.2d 576, 583, 88 S.Ct. 507, 514 (1967).

whom it is performed, and office practices and regulations permitting warrantless searches) must be considered. *Id.* Moreover, nothing in the holding of *Page*, 911 P.2d at 517, precludes its application to this case.

Appellee also errs in claiming that this case is distinct from *Page* because Ms. Cowles, at her desk, was visible to any person standing in Great Hall who peered through the door or window of her office. Again, the state misconstrues the true import of *Page*, that when a person knowingly reveals private matters to other people in a room, he or she may still reasonably expect that "these private matters are not being simultaneously broadcast to other locations or electronically recorded for later scrutiny." *Id.*, 911 P.2d at 516. Just as it was reasonable for Page to assume that his drug activities in view of others in the apartment would not be broadcast or videotaped, it was reasonable for Ms. Cowles to assume that her activities in her office, even if seen by others, would not be broadcast or videotaped.

Appellee then claims that *Takata* is inapplicable because, in that case, the office had been reserved for the defendant O'Brien's exclusive use and the investigation had turned from an internal investigation of employee misconduct to a criminal investigation before the video camera was installed. Appellee's Brief at 9-10. Yet, actually, the Ninth Circuit relied upon the trial court's finding that another DEA office had a master key to the office in question and three other DEA agents had access to O'Brien's office, in ruling that O'Brian's [sic] expectation that he would not be secretly videotaped by a government official using a camera in the ceiling was reasonable. *Id.*, 923 F.2d at 672-675. The similar fact that a

supervisor, and a few student employees and invited guests had access to Ms. Cowles' office, secured with a combination lock on the door, does not render unreasonable Ms. Cowles' claim of privacy, as "[p]rivacy does not require solitude . . . even 'private' business offices are often subject to the legitimate visits of coworkers, supervisors or the public without defeating expectation of privacy." *Id.*, 923 F.2d at 672.

Moreover, as outlined above, Ms. Cowles' case is identical to *Takata*, 923 F.2d at 675, in that what began as an internal investigation of employee misconduct turned into a criminal investigation of an employee committing a crime, and only at that point did the warrantless video surveillance commence. [Tr. 17; Tr. 22-24; Tr. 61; Tr. 395-399, R. 424-428; Tr. 636-640]. In *Takata*, the Ninth Circuit held that even though the same DEA agents conducted both the internal and criminal investigations, the night that the agent discovered the illegal wiretap and installed the video camera, the character of the investigation changed and a warrant was required. *Id.*, 923 F.2d at 675. In Ms. Cowles' case, the shift from an internal audit and report of the UAF Theatre Department box office's cash receipts to a criminal investigation of Ms. Cowles by the UAF Police Department,[6] in consultation with the state District Attorney's Office, was even more clear than in *Takata* because the agencies and agents conducting the investigation changed and because the later occurred two

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[6] It should be noted the UAF Administration also considered having the Alaska State Troopers investigate Ms. Cowles in order to establish a criminal case against her. [R. 636].

weeks later in time. [Tr. 27-28; Tr. 45; Tr. 399-400; Tr. 636-640]. Thus, the UAF Police Department "cannot cloak itself in . . . [a public employer's] robes in order to avoid the probable cause requirement when it is acquiring evidence for a criminal prosecution." *Id.*, 923 F.2d at 675.

As to *State v. Bonnell*, 856 P.2d 1265, 1270, 1276 (Hawaii 1993), appellee asserts that Bonnell's situation was different from that of Ms. Cowles' because his reasonable expectation against being surreptitiously videotaped occurred in a break room for postal employees and invited guests, where anyone seated there "could see anyone approaching and could avoid being surprised by an untrusted intruder." *Id.* Again, the state disregards the fact that the only persons allowed inside the UAF Theatre Department box office with Ms. Cowles were student employees, her supervisor and other invited guests, and that she, too, could see anyone approaching the window or the door to her office [Tr. 17-19; 24-25; Tr. 86-87; Tr. 89; Tr. 96; Tr. 300; Tr. 357; Tr. 418].

Appellee also complains that the *Bonnell* case is factually distinct in that the local police came in and installed the videocameras in ceiling of the post office break room. *Id.* Yet, cases dealing with this issue draw no distinction between which branch of law enforcement conducts the warrantless search; rather, the critical fact is that it is law enforcement in the course of a criminal investigation, not a supervisor in the course of an employment action, who is conducting the search. *O'Connor*, 480 U.S. at 717-719, 721-724, 107 S.Ct. 1492 at 1500-1502, 1504-1506, 94 L.Ed.2d at 722-723, 7225-72; *Takata*, 923 F.2d at 675.

Finally, the state claims that the fact that the defendant in *State v. Thomas*, 642 N.E.2d 240, 242-243, 247, (Ind. App. 1994), worked as a licensee pursuant to a license and concession agreement with the Indiana Department of Natural Resources, ("DNR") gave him a greater possessory right to the campstore than Ms. Cowles, as a public employee, had to her office and desk.[7] Notably, the converse of this proposition is true: "a determination that a person does not have a personal possessory interest in the location searched does not end the analysis" and does not mean that a person may not have reasonable expectation of privacy under the circumstances. *Takata*, 923 F.2d at 676, *citing*, *Katz*, 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582. That position is further undermined by the Indiana Court of Appeals' reliance upon analysis used in public employee cases. *Thomas*, 642 N.E.2d at 242-243, 247.

Close review of *Page*, *Takata*, *Bonnell*, and *Thomas* demonstrate that the cases are factually analogous and govern this appeal. Applying their rationale, it is obvious that Ms. Cowles had a reasonable expectation of privacy against being surreptitiously and continuously monitored and videotaped by UAF police investigating her by the use of a camera lodged in the ceiling over her desk. Since

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[7] In reality, Thomas' duties under the agreement to maintain the campstore, supervise the business, operate the business according to law, and pay DNR a monthly fee, closely approximate Ms. Cowles' duties at the UAF Theatre Department box office to maintain a $500 petty cash fund, sell theatre tickets and souvenirs, counting and preparing deposits of theater proceeds, clerical work and supervising other employees. *Id.*, 642 N.E.2d at 242. [Tr. 19; Tr. 300; Tr. 357].

the video surveillance and taping occurred without a *Glass* warrant, the fruits of that search should have been suppressed as evidence. *Page*, 911 P.2d at 517.

* * *

CONCLUSION

The trial court erred in not granting the appellant's motion to suppress videotape, interrogation, search warrants and motion to dismiss indictment. As such, Ms. Cowles' conviction and the trial court's order denying these motions should be reversed. Upon remand, all evidence derived directly or indirectly from the videotape, her interrogation and the search warrants should be suppressed at any future grand jury and trial.

Alternatively, because the trial court erred in precluding her from presenting relevant testimony, and erred in denying the motion for new trial, this court should reverse her conviction and remand her case for a new trial, with an order that Ms. Aronow-Brown and Ms. Scholle be allowed to give their testimony discussed herein.

Should Ms. Cowles' conviction stand or she be reconvicted, this court should order that the restitution order be vacated and the trial court recalculate restitution based upon substantial evidence proved by a preponderance of the evidence.

Dated at Fairbanks, Alaska, this 30th day of September, 1997.

ALASKA PUBLIC
DEFENDER AGENCY
BARBARA BRINK,
Public Defender
By:
/s/ Colleen A. Kosluchar
Colleen A. Kosluchar
Assistant Public Defender
Alaska Bar No. 9106018

IN THE SUPREME COURT
FOR THE STATE OF ALASKA

LINDALEE COWLES, Petitioner vs. STATE OF ALASKA, Respondent.	S.Ct. Case No. S-___ COA Case No. A-06381 Trial Court No. 4FA-S95-2145CR

PETITION FOR HEARING

(Filed Oct. 16, 1998)

VP.A CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of sexual offense listed in A.S. 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

I.

PRAYER FOR REVIEW

Petitioner Lindalee Cowles asks this court to exercise its power of discretionary review of the attached court of appeals opinion, *Cowles v. State*, Op. No. 1599 (July 31, 1998), in accordance with Alaska R. of App. Proc. 302(a)(1).

II.

ISSUES PRESENTED FOR REVIEW

Did the court of appeals err when it determined that no warrant was required to authorize surreptitious videotaping of Ms. Cowles in her work place?

Did the court of appeals err in its application of the test to determine when statements made in response to police questioning are the product of custodial interrogation?

III.

STATEMENT OF FACTS

The intermediate court's opinion, a copy of which is attached, contains a statement of the facts underlying the issues presented to this court. The statement is incomplete as to the first issue presented inasmuch as it fails to note the following: Ms. Cowles had been employed as box office manager and administrative assistant since October, 1993; in addition to her duties related to financial matters, she supervised part-time employees and performed clerical work for the theatrical department. She had a right of access to her office at any time and the right and obligation to secure the office, by closing the window and locking the door, from intruders in her absence. When seated at her desk, Ms. Cowles could see anyone approaching and could avoid being surprised by an untrusted onlooker. Only when the roll-up window was up could a customer come to the window to purchase a ticket; customers never entered the office to buy tickets.

The facts underlying the second issue presented to this court are set forth in the court of appeals' opinion.

IV.

STATEMENT OF POINTS RELIED UPON FOR REVERSAL OF THE INTERMEDIATE APPELLATE COURT'S DECISION

Ms. Cowles argued below that when the university police hid a video camera directly above her desk in her office and used it to monitor and record her as she worked at her desk, their conduct amounted to an unreasonable warrantless search. The court of appeals found the police conduct to be reasonable, and therefore not subject to the constitutional warrant requirement. The court relied on the second prong of the test established by this court in *State v. Glass*, 583 P.2d 872, 880 (Alaska 1978); the court held that Ms. Cowles' expectation of privacy is not one that society would recognize as reasonable. In reaching this conclusion, the court relied on the trial court's factual findings to characterize Ms. Cowles' workplace as "open and public". Secondly, the court found that the videotaping was reasonable because of the "fiduciary" capacity in which Ms. Cowles was employed. *Cowles v. State*, Op. No. 1599 at 10-11 (July 31, 1998).

In reaching its conclusion, the court of appeals cited its decision in *Page v. State*, 911 P.2d 517 (Alaska App. 1996), where the court held that warrantless surreptitious videotaping of illegal conduct occurring within an apartment was unreasonable within the meaning of Article 1, Sections 14 and 22 of the Alaska constitution and *State v. Glass*, 583 P.2d 872 (Alaska 1978). The second prong of the

Glass test, the court said, presents a legal question which "rests on constitutional intent and ultimately, judgment concerning the proper balance to be struck between the rights of the individual and the authority society exercises over individuals through the agency of government". *Page*, 911 P.2d at 515-516. The careful balancing which the foregoing statement suggests is required in cases such as this is utterly lacking in the appellate court's treatment of this matter. In concluding that Ms. Cowles' expectation of privacy was not objectively reasonable, the court refers readers of the opinion to a single case, *G.R. v. State*, 638 P.2d 191, 197 (Alaska App. 1981). *Cowles v. State*, Op. No. 1599 at 10 (July 31, 1998)

G.R. involved a warrantless search of the woods around a cabin for weapons. 638 P.2d at 196. The court found there had been no search for fourth amendment purposes because the connection between the guns and any private place was too remote. *Id.* at 197. The defendants, who claimed they resided at the cabin on occasion, did not own the property upon which the cabin stood. *Id.* at 196. It was unclear whether the land itself was publicly or privately held. The court said that if it was public land, the defendants "certainly could have no expectation that state troopers would not be walking in the vicinity of the cabin". *Id.* at 197. Can this be how the court viewed Ms. Cowles' office, and by extension, the offices of the thousands of other Alaskans whose business necessitates some measure of public access? Even if it is, does the court mean to equate a trooper's walk through the bush with what happened here; here, the officer crawled through the ductwork in the ceiling to hide a video

camera in a ceiling vent above Ms. Cowles' desk and then recorded Ms. Cowles' activities below.

The court ignored case law which holds that the mere fact that other workers or members of the public can enter an office and approach the defendant does not transform that office and the defendant's desk into a public place. *See e.g. U.S. v. Taketa* [sic], 923 F.2d 665, 672-673 (9th C. 1991). The court ignored as well its own statement in *Page:* while Page couldn't claim that he expected complete visual privacy, he nevertheless could expect that when he revealed private matters to others "those matters were not being simultaneously broadcast to other locations or electronically recorded for later scrutiny". *Page*, 911 P.2d at 516. While the court acknowledges by brief citations the intrusiveness of surreptitious videotape surveillance, that factor appears to carry no weight in the court's analysis. *Cowles v. State*, Op. No. 1599 at 10 (July 31, 1998) In one of the cases cited in the opinion, the court said this:

> The usual way in which judges interpreting the Fourth Amendment take account of the fact that searches vary in the degree to which they invade personal privacy is by requiring a higher degree of probably cause (to believe that the search will yield incriminating evidence), and by being more insistent that a warrant be obtained if at all feasible, the more intrusive the search is.

United States v. Torres, 751 F.2d 875, 882 (7th Cir. 1984). While the appellate court appears to agree with the *Torres* characterization of video surveillance as "exceedingly intrusive", the court fails to give any weight to that fact

or to the fact that obtaining a warrant in this matter would not have unreasonably hampered law enforcement. *See Glass*, 583 P.2d at 881. Indeed, in its written opinion in this matter, the trial court noted that probable cause "certainly" existed for such a warrant.

The court also ignores case law from other jurisdictions which distinguishes between "open view" police observation which takes place from a non-intrusive vantage point and surreptitious videotaping by hidden cameras. *See State v. Bonnell*, 856 P.2d 1265, 1276 (Hawaii 1993); *State v. Thomas*, 642 N.E. 2d 240, 245-246 (Ind. App. 1994). Those courts have held that a person's expectation that his conduct will not be subjected to such electronic surveillance is reasonable. *See also U.S. v. Taketa* [sic], 923 F.2d 665, 676 (9th C. 1991) (although the defendant had no privacy interest in his co-defendant's office, he did have an expectation of privacy against being videotaped there).

The second ground for the court's decision – that Ms. Cowles' work was "fiduciary" in character – is supported by no analysis or case law. According to the court, because private businesses where money is exchanged employ video cameras to record activities on their premises, Ms. Cowles expectation of privacy was not reasonable. The court ignores the critical distinction between the activities of private entities and those of law enforcement conducting a criminal investigation to gather evidence for a criminal investigation. Furthermore, many private employers use surveillance cameras openly to record everything which occurs on their premises; while it may be that employees are the subject of the surveillance, it is frequently intended as well to deter non-employees and

in doing so, provide some measure of protection to employees.

Ms. Cowles had an expectation that as she worked at her desk in her office, her conduct would not be scrutinized from the ceiling by a video recorder. The community would recognize that expectation as reasonable. The trial court and the reviewing court erred.

B. The court erred in its application of the objective test for custody.

It was undisputed below that Ms. Cowles was subjected to interrogation by officers of the university police force and that the questioning occurred at the police station. The trial court found that the questioning was not "custodial" in nature; the court of appeals agreed.

It is well settled that the test for custody is to be applied objectively: "would a reasonable person in the suspect's position have felt free to break off questioning and, depending upon the location of the interview, either leave or ask the police to leave?" *Edwards v. State*, 824 P.2d at 1284, *citing*, *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979). In *Hunter*, this court identified three groups of facts which are relevant to the determination of whether a person is in "custody" for *Miranda* purposes: facts intrinsic to the interrogation, facts pertaining to events which occurred prior to the interrogation and facts pertaining to what happened after the interrogation, *Id.* These facts are to be assessed objectively, to determine their effect on a reasonable person.

In *Hunter*, this court emphasized the value of the objective standard for purposes of determining when *Miranda* warnings were required. Such a test

> gives effect to the purpose of the *Miranda* rules; it is not solely dependent on either the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question.

590 P.2d at 895-896 (citation omitted). The court also noted in *Hunter* the illogic of relying on the fact that a person was ultimately released after making incriminating statements as the determinative test for custody; the question is whether the defendant was in custody at the time the incriminating statements were made. *Id.* at 895, n. 23.

In this case, the trial court said in its written opinion, that considering the facts of the case under the *Hunter* criteria, "at first blush", would seem to indicate that the interrogation was custodial in nature. The court decided that the "best evidence" of the character of the interview was the tape of it; based on the court's perception of the tone of the interrogation and of the statements made by Ms. Cowles and the police, the interrogation was not custodial. The appellate court agreed, in part because at the end of the questioning, Ms. Cowles said she needed to go and the interrogation came to a close. *Cowles v. State*, Op. No. 1599 at 13-14.

What is said and done after incriminating statements are elicited should not control the inquiry. What is material are the three groups of facts set out in the *Hunter* test and how those facts would influence a reasonable person

in Ms. Cowles position at the time the incriminating statements were made. Both the trial court and the appellate court failed to correctly apply the objective test required under *Hunter*.

V.

NECESSITY OF REVIEW

The court of appeals has decided in this case a question which has not previously been decided by this court: does the character of a person's work place divest that person of the protections of Article 1, Sections 14 and 22 of the Alaska constitution and the fourth amendment to the U.S. constitution such that law enforcement is free to engage in warrantless surreptitious videotape surveillance and recording? This is a question which has substantial public importance to the public as a whole and to the character of our community.

The court has also misapplied the test for custodial interrogation as mandated by this court's decision in *Hunter v. State*, 590 P.2d 888 (Alaska 1979). The exercise of this court's supervisory authority over the other courts on this question would have significant consequences to both those who are subjected to police interrogation and to those who perform that interrogation.

VI.

CONCLUSION

Based upon the foregoing, Ms. Cowles respectfully requests that this court grant her petition for hearing to review the Court of Appeals decision in his case.

DATED at Fairbanks, Alaska, this 16th day of October, 1998.

ALASKA PUBLIC DEFENDER AGENCY
BARBARA K. BRINK, Public Defender

By: /s/ Susan Downie
Susan Downie
Assistant Public Defender
AK Bar No. 8611106

THIS IS TO CERTIFY THAT A COPY OF THE FOREGOING IS BEING X MAILED/ HAND DELIVERED TO THE FOLLOWING ATTORNEY(S) OR PARTIES OF RECORD:

/s/ CKelly 10/16/98
Name Date

IN THE SUPREME COURT OF THE STATE OF ALASKA

LINDALEE COWLES,	)	Supreme Court No. S-8831
Petitioner,	)	
vs.	)	
STATE OF ALASKA,	)	
Respondent.	)	

Trial Court No. 4FA-S95-2145 Criminal
Court of Appeals No. A-6381

PETITION FOR HEARING FROM THE JULY 31, 1998 DECISION OF THE ALASKA COURT OF APPEALS

PETITIONER'S OPENING BRIEF

Certification

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by this Court.

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Filed in the Supreme Court this
1st day of June, 1999.

/s/ Cheryl Jones
Deputy Clerk

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the Court of Appeals erred by concluding that a search warrant was not required for the police to surreptitiously install a hidden videotaping device in the ceiling above Lindalee Cowles' desk and thereby observe and record, from the vantage point of the ceiling, all of Cowles' activities in the vicinity of her desk.

2. Whether the Court of Appeals erred by concluding that Lindalee Cowles was not subjected to a custodial interrogation.

* * *

motion, Cowles appealed to the Court of Appeals. [Tr. 768, R. 335-370].

On July 31, 1998, the Court of Appeals rendered its decision. Except for ruling in Lindalee Cowles' favor on a restitution issue, the Court of Appeals ruled against Cowles on all the issues she raised. *See Cowles, supra*, 961 P.2d at 440-48; [Exc. 30-38]. Among other things, the Court of Appeals ruled: (1) that because of the purported "open and public nature of the place where Cowles worked" and the supposed "fiduciary capacity" in which Cowles worked, "Cowles did not have a reasonable expectation of privacy from video surveillance in the box

office" and thus the police did not need to obtain warrant prior to engaging in the recovery surveillance of Cowles via the video device clandestinely placed in the ceiling of her office; and (2) that Cowles was not subjected to a custodial interrogation. *Cowles*, 961 P.2d at 442-45; [Exc. 32-35]. Cowles then petitioned this Court for hearing on these two issues, and on February 10, 1999, the Court granted hearing.

ARGUMENT

I. The Rights Against Unreasonable Searches And Seizures To Privacy Embodied In Article I, §§ 14 And 22 Of The Alaska Constitution And the Fourth And Fourteenth Amendments To The United States Constitution Require The Police To Have Obtained A Search Warrant Prior To Installing A Covert Videocamera In The Ceiling Above Lindalee Cowles' Desk.

A. Standard Of Review

Whether Lindalee Cowles' expectation of privacy is one that Alaskan society or American society in general is prepared to recognize as being reasonable, i.e., whether the actions of the police in this case violate Lindalee Cowles' state and federal constitutional rights against unreasonable searches and seizures and to privacy, are questions of law which this Court will review *de novo*, exercising its own independent judgment and determining the most persuasive rule in view of precedent, reason, and policy. *See Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963, 966 (Alaska 1997); *Agen v. State, Department of Revenue, Child Support Enforcement Division*, 945 P.2d 1215, 1219 n.6 (Alaska 1997); *Page, supra*

911 P.2d at 515-16. To the extent that any factual findings by the trail [sic] court are involved in this Court's review of the case, those factual findings will be upheld unless clearly erroneous. *Cowles, supra*, 961 P.2d at 443; [Exc. 33].

B. Discussion

The rights against unreasonable searches and seizures and to privacy embodied in Article 1, §§ 14 and 22 of the Alaska Constitution provide greater protection of individual privacy interests than do the Fourth and Fourteenth Amendments to the United States Constitution. *Valley Hospital Association, supra*, 948 P.2d at 967-68; *State v. Glass*, 583 P.2d 872, 874-82 (Alaska 1978). Thus, if police conduct violates the Fourth and Fourteenth Amendments, such conduct necessarily violates Article I, § 14 and 22 of the Alaska Constitution; on the other hand, if police conduct does not violate the Fourth and Fourteenth Amendments, that police conduct may nonetheless violate Article I, §§ 14 and 22 of the Alaska Constitution. *See Valley Hospital Association*, 948 P.2d at 966-72; *Glass*, 583 P.2d at 874-82.

In the Court of Appeals the State conceded that if the covert video surveillance of Lindalee Cowles violated her constitutional rights, then Cowles' statements to the police and the evidence obtained via the search warrants must be suppressed as the poisonous fruits of the illegal surveillance. [Exc. 26]. When such evidence is suppressed, not only must Cowles' conviction be reversed, but also the indictment must be dismissed since the impermissible evidence surely swayed the grand jury given the dearth of properly admissible evidence. *See*

State v. Stern, 827 P.2d 442, 445-46 (Alaska App. 1992). Moreover, Cowles having now faced the jeopardy of trial, she is entitled to a judgment of acquittal because when the evidence that should have been suppressed, but was not, is removed from the case presented to the jury, no reasonable juror could convict Cowles of the crime charged. *Gray v. State*, 463 P.2d 897, 905 (Alaska 1970).

1. The United States Constitution

Applying the Fourth Amendment safeguard against unreasonable searches and seizures, and any corresponding state constitutional provisions, courts in other jurisdictions - where the privacy protections are not necessarily as extensive as those guaranteed to Alaskans - have nonetheless recognized that public employees at their workplaces have reasonable expectations that they will not be subjected to warrantless, covert video surveillance by the police conducting a criminal investigation. *See United States v. Takata*, 923 F.2d 665, 675 (9th Cir. 1991); *State v. Bonnell*, 856 P.2d 1265, 1277 (Hawaii 1993); *State v. Thomas*, 642 N.E.2d 240, 248-249 (Ind. App. 1994).

In *Takata*, O'Brien, a federal agent, and Takata, a state agent, worked in two small attached offices in an airport facility maintained by the Drug Enforcement Agency ("DEA"); the two were convicted of intercepting telephone conversations illegally with a modified pen register. *Takata*, 923 F.2d at 668-69. In the course of investigating Takata and O'Brien for these criminal acts, DEA agents obtained a master key from the supervisor of the airport facility to determine the feasibility of installing video surveillance equipment the next time the office

was authorized to operate a pen register. *Id.* at 668. Once the office was authorized, the DEA agents forced the lock and entered O'Brien's office and, among other things, installed a hidden video camera in the ceiling of the office aimed at the pen register. *Id.* at 669. Thereafter, the DEA agents entered the office again to replace tapes in the surveillance camera and to execute a search warrant for O'Brien's and Takata's personal and business items. *Id.* When O'Brien and Takata moved to suppress this evidence based upon the Fourth Amendment, the trial court denied that motion. *Id.*

The Ninth Circuit found that O'Brien had a reasonable expectation of privacy in his office. *Id.* at 673. The court explained that "the privacy analysis does not turn on property rights" to the government office; instead, an employee may have a privacy interest in his office, beyond his personal effects if he meets the *Katz*[6] test of "a subjective expectation of privacy that is objectively reasonable." *Id.* at 672. Additionally, the *Takata* court emphasized that no "established regulatory scheme or specific office practice defeated that expectation" of privacy. *Id.*; *cf. Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1335 (9th Cir. 1987) (Public employee had reasonable expectation of privacy in his office "unless he was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes.").

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[6] *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507; 19 L.Ed. 516 (1976).

In rendering its decision the Takata court rejected the government's contention that the downtown DEA office's possession of a master key to the airport office and the access of other airport DEA employees to O'Brien's office defeated his privacy expectations. *Takata*, 923 F.2d at 672. Regarding the former, the court noted that "allowing the existence of a master key to overcome the expectation of privacy would defeat the legitimate privacy interest of any hotel, office or apartment occupant." *Id.* at 673. Concerning the latter, the court explained that:

> Privacy does not require solitude. As *O'Connor*[7] recognized, even "private" business offices are often subject to the legitimate visits of coworkers, supervisors, and the public without defeating the expectation of privacy unless the office is "so open to fellow employees or the public that no expectation of privacy is reasonable. O'Brien's office was not open to the public, and was not subjected to regular visits of inspection by DEA personnel. The only people to have regular access to it were the three agents stationed at the airport. The access of others does not defeat O'Brien's expectation of privacy in his office.

Id. (citations omitted).

The *Takata* court went on to consider whether O'Brien (who had a reasonable expectation of privacy in his office) and Takata (who did not have a reasonable expectation of privacy in O'Brien's office) had reasonable privacy expectations that they would not be videotaped in

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[7] *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1981)

O'Brien's office by government agents searching for evidence of criminal conduct. *Id.* at 674-75. The court found that both agents' expectations that they would not be videotaped by government officials while working in O'Brien's office were reasonable. *Id.* In doing so, the court emphasized that suppression was required because the purpose of the warrantless video surveillance was to obtain evidence of a crime for a criminal prosecution (as opposed to an internal investigation into work-related employee misconduct in order to take employment action) and because video surveillance is exceptionally intrusive. *Id.* at 675-677.

Similarly, in *State v. Thomas*, 642 N.E.2d 240 (Ind. App. 1994), the court held that the warrantless, covert video surveillance by the Department of Natural resources ("DNR") of Thomas' cash register area in a campstore in a state park that he licensed from DNR was an illegal search, and upheld the trial court's decision suppressing all evidence derived from that search. *Id.* at 242-43, 247. The license and concession agreement between Thomas and DNR gave DNR some authority over operations and management of the campstore and required Thomas to maintain the campstore, supervise the business, operate the business according to law, and pay DNR a monthly fee. *Id.* at 242. DNR conservation officials, who were considered law enforcement officers, were called upon to investigate a complaint that Thomas was not ringing up sales at the campstore and was thereby improperly withholding that percentage of revenue from DNR. *Id.* at 242 & n.4. The conservation officials obtained a master key for the campstore from the DNR property manager and made several entries into the

campstore. During one entry, the conservation officials "drilled a hole in the ceiling and installed and aimed the video camera 'strictly over the cash register.' " *Id.* at 242.

The conservation officials timed the videocamera to record the activities near the cash register of the campstore during business hours. *Id.* The conservation officials then collected and reviewed the videotapes that showed that the campstore took in significantly more revenue than Thomas reported. *Id.* at 243. Upon confronting Thomas and his employes, the conservation officials obtained more incriminating evidence and charged Thomas with two counts of theft. *Id.* Thomas' motion to suppress the videotapes and the subsequent incriminating statements was granted by the trial court. *Id.*

The Indiana Court of Appeals agreed with Thomas and the trial court that Thomas' subjective expectation of privacy not to be surreptitiously videotaped in the campstore was objectively reasonable. *Id.* at 246. On appeal, the state argued that Thomas had no reasonable expectation of privacy that he would not be videotaped on his licensed premises during business hours in a place open, visible, and accessible to the public. *Id.* at 244. However, the Thomas court rejected that "open view" argument, observing that the issue could not be "resolved simply by a determination that the scope of the surveillance was limited to the observation of transactions conducted during business hours in a public place." *Id.* at 244. Thus, in addition the issue of "ownership and possession," the court considered: "(1) the surreptitious means by which the video surveillance was accomplished, including the location of the equipment and the method utilized to

place it there, and (2) the degree of intrusion inherent in the continuous nature of video surveillance." *Id.*

In applying these factors, the Thomas court found that although Thomas did not have an absolute expectation of privacy in the entire concession area, "he had a right of possession to the campstore superior to that of the general public," which only had a limited right of access for the purpose of conducting business. *Id.* at 245. The court reasoned that "DNR's right to audit and inspect the concession did not render the area public for all purposes and confer upon it a right to invade the licensed area after business hours, install hidden video equipment and conduct video surveillance." *Id.*

As to the second factor, the *Thomas* court noted that covert "video surveillance has been recognized to be one of the most intrusive forms of searches performed by the Government, regardless of the type of premises searched." *Id.* Covert surveillance:

> . . . produces an immediate negative visceral reaction and raises the spectre of the Orwelllian [sic] state . . . [T]elevision surveillance in criminal investigation [is] "reminiscent of the 'telescreens' by which 'Big Brother' in George Orwell's *1984* maintained visual surveillance of the entire population of 'Oceania,' the miserable country depicted in that anti-utopian novel . . ." We, too, believe that video surveillance is 'exceedingly intrusive . . . and inherently indiscriminate, and this could be grossly abused – to eliminate personal privacy as understood in modern Western nations."

Id. (citation omitted, brackets added)

The court in *Thomas* also ruled that the state's reliance upon the "open view" doctrine was misplaced because that doctrine pertains only to situations in which the observation takes place from a non-intrusive vantage point. *Id.* In contrast, the video surveillance conduced by the DNR's conservation officers occurred from a grossly intrusive vantage point, the campstore's attic and ceiling, which was an area not accessible to the public in open view." *Id.* Thus, "[w]hatever the general privacy interests Thomas may or may not have had inside the campstore, he had an actual, subjective and reasonable expectation of privacy against being videotaped from overhead [from a non-public vantage point] during a four day period." *Id.* at 246. After weighing all three factors, the Thomas court affirmed the trial court's suppression of evidence. *Id.* at 246-247.

In *State v. Bonnell*, 856 P.2d 1265 (Hawaii 1993), the court upheld suppression of evidence obtained as a result of warrantless, covert video surveillance of postal workers in the post office break room in the course of a criminal investigation of illegal gambling. *Id.* at 1270, 1279. Based upon two anonymous letters alleging that illegal gambling was taking place at the downtown Lahaina post office, a postal inspector and the local police – without a warrant – surreptitiously installed video cameras in four areas of the post office (including one placed in the smoke detector in the break room which focused on the break room table), in order to conduct covert surveillance of postal workers. *Id.* After one year of clandestine videotaping during regular work hours, the videotape showed a small amount of gambling activity. *Id.* at 1271. Based on that evidence, the defendants were charged.

However, the trial court granted the defendants' motions to suppress the evidence as being illegally obtained. *Id.* at 1271-1272.

In evaluating the reasonableness of the defendants' expectations of privacy, the Hawaii Supreme Court considered "the nature of the area involved, the precautions taken to insure privacy, and the type and character of [the] governmental invasion employed." *Id.* at 1275 (quotation and citation omitted). The *Bonnell* court found that the employee break room "was neither a public place nor subject to public view or hearing," because only postal employees and invited guests were allowed in the room and anyone seated in the break room "could see anyone approaching and could avoid being surprised by an untrusted intruder." *Id.* at 1276.

As in *Thomas*, the court in *Bonnell* explained that the in-ceiling videocamera surveillance did not constitute "open view" observation by a governmental agent from a non-intrusive vantage point because the prying device was not "on the outside looking outside, or on the outside looking inside [at] that which is knowingly exposed to the public." *Id.* (quotation and citation omitted). Rather, *Bonnell* involved "yearlong observations, from the 'inside looking inside' of a smoke detector-obscured 'seeing eye' video camera occupying a grossly intrusive vantage point and targeting activity that by no stretch of the imagination can be regarded as having been knowingly exposed to the public." *Id.*

The *Bonnell* court then explained that governmental invasion by video surveillance is "exceedingly intrusive" and "inherently indiscrimiante" so as to pose a significant

risk of being "grossly abused" toward the extinction of the personal privacy we so treasure in the modern world. *Id.* at 1277 & n.8. Thus, the *Bonnell* court held that the defendants had a reasonable expectation that while in their break room, they would not be covertly videotaped by police officers conducting a criminal investigation. *Id.* at 1277. Accordingly, the court agreed that the warrantless search was illegal and affirmed suppression of the evidence obtained from the search. *Id.* at 1279.

Applying the criteria utilized by the courts in *Takata*, *Thomas*, and *Bonnell*, the warrantless, covert video surveillance of Lindalee Cowles at her desk violated her reasonable expectation of privacy. First, even though Cowles may not have an absolute expectation of privacy in her office, that does not mean that society recognizes no expectation of privacy in her office. Her expectation of privacy in her office is not defeated merely because the office had a window and was legitimately accessible during business hours to student employees, supervisors, and invited guests. *Takata*, 923 F.2d at 673; *Thomas*, 642 N.E.2d at 244; *Bonnell*, 856 P.2d at 1276; [Tr. 17, 20-25, 85-89, 96, 308, 313, 363].

In this regard, the UAF Theatre Department box office was not a common area for all purposes at all times. [Tr. 17, 20-25, 85-89, 96, 308, 313, 363]. Only during business hours, and even then only when the roll-down window was up, could a customer come to the window to purchase a ticket. [Tr. 17, 20, 85, 89, 308]. Customers never went inside Lindalee Cowles' office to purchase tickets. [Tr. 17-18]. In fact, a person could only get into the Theatre Department box office if he or she knew the combination to the door's lock, a combination that was

changed regularly and was known only to Cowles, student employees, and members of the Theatre Department. [Tr. 24-25, 85, 313, 363]. In short, Cowles' office was simply not a "public" place.[5]

Cowles had a right of access to her office at any time and the right and obligation to secure the office from intruders in her absence, by closing the window and locking the door. [Tr. 85, 89, 96, 313, 363]; *cf. Thomas*, 642 N.E.2d at 245. When seated at her desk, Cowles could see anyone approaching and could avoid being surprised by an untrusted onlooker. [Tr. 86-87]; *cf. Bonnell*, 856 P.2d at 1276.

Moreover, "[t]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 582 (1976). Therefore, even assuming that Lindalee Cowles' privacy interest in her office itself were not recognized, Cowles still retained an interest in not having her person be the object of video surveillance and broadcasting. *Takata*, 923 F.2d at 676-77.

Furthermore, the trial court's reliance upon the "open view" doctrine is misplaced just as in *Thomas* and *Bonnell*. As in those cases, the videocamera's observation of Lindalee Cowles took place from the same highly intrusive vantage point – the ceiling above – and was pointed almost directly over her desk. [Tr. 27-28, 44-45,

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[5] As explained in footnote 1, *supra*, Great Hall itself had specific hours during which time it was open to the traffic of students, faculty, and members of the public. [Tr. 362, 388]. It was locked from 10 p.m. until morning. [Tr. 362, 388]. Thus, while called the "Great Hall," it is not the great, unrestricted human highway portrayed by the trial court.

399-400]. The video surveillance was not comparable to observations coming from Great Hall looking inside Cowles' office through a window or door. Instead, the ventilator-obscured videocamera was planted in her office ceiling and was aimed directly over her head and desk. From this most invasive vantage point the videocamera recorded activity that could never be construed to be knowingly exposed to the public. [Trial Exhibit 9].

In contrast to the airplane-flyover analogy upon which the trial court based its decision [Exc. 8], but like the video surveillance from the ceiling over the cash register in *Thomas*, 642 N.E.2d at 245, the video surveillance from the ceiling over Cowles' desk watched from an area not accessible to the public and did so from a "grossly intrusive vantage point." Cowles, like the individual in *Thomas*, had "an actual, subjective and reasonable expectation of privacy against being videotaped from overhead . . . by the government from a non-public vantage point." *Id.* at 246.

Furthermore, like the DEA in *Takata*, 923 F.2d at 672-73, the UAF Theatre Department had established no employee regulations or policies to forewarn employees such as Lindalee Cowles that they would be subject to warrantless video surveillance on the job, and it follows that the Department had established no regular, specific office practice of conducting any such video surveillance. Rather, the record is undisputed that the covert video surveillance of Cowles was laid and hatched by the UAF police as a part of their own criminal investigation targeting Cowles for theft, after the employer's initial audit had already been concluded. [Tr. 17-24, 395-396; R. 424-428].

Finally, as to the Court of Appeals fabrication of a "fiduciary" exception to the reasonableness of Lindalee Cowles' expectation of privacy, the Court of Appeals does not cite, and the undersigned counsel has not located, any authority to support the "fiduciary" exception. Even if one were to assume that Cowles worked in a fiduciary capacity, not only did the individual in *Thomas* act in a much more open area than Cowles' office, but the individual in *Thomas* then stood in an equal or greater fiduciary capacity, by virtue of his express agreement to pay a share of the proceeds to the DNR; yet, his expectation of privacy was still held to be reasonable. *See Thomas*, 642 N.E.2d at 242-47.

In sum, the warrantless covert audio surveillance of Lindalee Cowles must be condemned as violation of the privacy interests protected by the Fourth and Fourteenth Amendments. It must be kept in view that video surveillance is "one of the most intrusive forms of searches performed by the government, regardless of the type of premises searched." *Thomas*, 642 N.E.2d at 245; *see Takata*, 923 F.2d at 677; *United States v. Cueva-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987); *United States v. Torres*, 751 F.2d 875, 877, 882, 885 (7th Cir. 1984); *Bonnell*, 856 P.2d at 1276-1277. Such surveillance couples the two traits that most threaten personal privacy – extreme intrusiveness and indiscriminate prying into the activities of our citizens. *Thomas*, 642 N.E.2d at 245; *Bonnell*, 856 P.2d at 1277 & n.8.

2. The Alaska Constitution

In *Glass, supra,* the Court adopted the two-pronged *Katz* test to determine whether one has a protected expectation of privacy under Article I, §§ 14 and 22 of the Alaska Constitution: (1) an individual must have an actual, subjective expectation of privacy, and (2) the individual's expectation of privacy must be one that Alaskan society is prepared to recognized as being objectively reasonable. *Glass,* 583 P.2d at 875-80. While the linguistic formulation of the *Glass* test and the *Katz* test are essentially the same, the *Glass* test provides more protection of privacy. In other words, given Alaska's expressly-enumerated right to privacy and the bold tradition of liberty in Alaska, Alaskans have a significantly greater reasonable expectation of privacy than do other Americans. *Glass,* 583 P.2d at 875-81; *see Valley Hospital Association, supra,* 948 P.2d at 966-69.

* * * *

CONCLUSION

For the reasons stated, the decisions of the Court of Appeals and the trial court must be reversed. Thus, the video surveillance and the videotape the police made of Lindalee Cowles and any evidence obtained as a result thereof, including but not limited to statements Cowles may have made to the police and any evidence acquired via the search warrants, must be suppressed. Correspondingly, the indictment must be dismissed and a judgment of acquittal must be entered. Lindalee Cowles respectfully prays that the Court so order.

RESPECTFULLY SUBMITTED this 1st day of June, 1999, at Fairbanks, Alaska.

LAW OFFICE OF ROBERT JOHN

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Counsel for Appellant Lindalee Cowles

IN THE SUPREME COURT OF THE STATE OF ALASKA

LINDALEE COWLES, Petitioner, vs. STATE OF ALASKA, Respondent.	)	Supreme Court No. S-8831

Trial Court No. 4FA-S95-2145 Criminal
Court of Appeals No. A-6381

PETITION FOR HEARING FROM THE JULY 31, 1998 DECISION OF THE ALASKA COURT OF APPEALS

PETITIONER'S REPLY BRIEF

Certification

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by this court.

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Filed in the Supreme Court this
13th day of October, 1999.

/s/ Judi Holland
Deputy Clerk

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STATEMENT OF THE CASE

At page 3 of its brief the State contends that "[t]he camera's view was little different than any observer looking into the officer [sic] from the door or window." The State's contention merely begs the question: If the ceiling-mounted videocamera could only observe what could be seen by human observers from the door or window, why did the police go to such trouble to install it in the ceiling?

Also, the State's basic contention is nonsense. Should there by any doubt otherwise, that doubt is resolved in Lindalee Cowles' favor by a simple comparison of what is captured on the surveillance video [Evidentiary Hearing Exhibit 1; Trial Exhibit 9] versus what is shown on the seven-minute video prepared by Cowles' counsel for the evidentiary hearing, at which Cowles narrated the video from the witness stand. [Evidentiary Hearing Exhibit A; Tr. 83-89] While the video prepared by Cowles' counsel is admittedly an amateur production, the substance shows a zone of privacy that could be pierced – without Cowles' immediate knowledge and consent – only by a prying eye in the ceiling.

At page 4 of its brief the State maintains that Lindalee Cowles was taken to the police department out of Chief Florian's concern for the public nature of the box office and for Cowles' ankle injury. Yet nowhere is it indicated that the police gave Cowles the choice of having the situation explained there on the spot. Rather, the withholding of an explanation was itself coercive in that the police indicated to Cowles that she would have to

come to Chief Florian's office, to the police station, if she wanted an explanation. [Tr. 62]

ARGUMENT

I. **Lindalee Cowles' Expectation Of Privacy Was A Reasonable One; A Person At Her Desk, At Her Place Of Employment, Without Prior Notice That Her Activities Are Being Captured On A Hidden Videocamera Mounted In The Ceiling Above Her Desk, Reasonably Expects That Her Actions Are Not Being Filmed At All, Much Less From Above.**

At pages 10-21 of its brief the State engages in a lengthy effort to convince the Court that Lindalee Cowles could not have reasonably expected any level of privacy at her desk. As part of its discussion the State makes the astonishing assertion that "[t]he camera's view was undoubtedly from a different angle or perspective – above her desk rather than across from it. But the view from the camera disclosed nothing that could not be observed by a person looking inside the office from the Great Hall." (Brief of Appellee at 18) The State then maintains that if one stood both at the doorway and at the ticket window, the combination of the two views "would enable a person to see everything that the camera showed." (Brief of Appellee at 18) As discussed previously, the State's contentions about the view from the ceiling versus the combined views from the ticket window and the door defy common sense and are absolutely refuted when on compares the ceiling video with the video showing views from outside and inside Cowles' office. Moreover, even if the "combination of both views – the doorway and the window –" equated with the view

from the ceiling, no person could observe both views at once unless that person had two heads and a giraffe neck or ran back and forth in a manner bound to draw attention and alert one that some intrusive snooping was being attempted.

As demonstrated by Lindalee Cowles' testimony concerning the videotape of the views of her office, inside and out [Tr. 83-89], Cowles was able to "regulate [her] conduct as a function of present company." (Brief of Appellee at 15-16) (quoting *State v. Bonnell*, 856 P.2d 1265, 1276 (Hawaii 1993)). Nor are *Bonnell*, *State v. Thomas*, 642 N.E.2d 240 (Ind. App. 1994), and *United States v. Taketa* [sic], 923 F.2d 665 (9th Cir. 1991) distinguishable based on police involvement. As discussed at page 9 of Cowles Opening Brief, the UAF police were enlisted to investigate Cowles criminally and the police in turn enlisted the District Attorney's Office *prior* to setting up the covert video surveillance. Furthermore, even if the covert video surveillance were treated as part of a civil investigation in the employment context, the warrantless videotaping is still constitutionally infirm because there was no "established regulatory scheme or specific office practice" authorizing the surveillance, *Taketa*, 923 F.2d at 672; in other words, Cowles was *not* "on notice from [her] employer that searches of the type to which [s]he was subjected might occur from time to time for work-related purposes." *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1335 (9th Cir. 1987).

At page 20 of its brief the State maintains that "[t]he vantage point of the camera should be deemed intrusive only if it had provided a view unattainable by the public or if it was otherwise critical in providing the observation

of Cowles' criminal conduct." As discussed, the view from the ceiling was one unattainable by the public and could come close to being attained by human observation only with Lindalee Cowles' awareness and consent. Moreover, as Officer Brown testified, the observations through the videocamera were the critical evidence that triggered him to leave his surveillance perch and obtain the search warrants for Cowles's office, purse, and person. [Tr. 29-30, 45-46]

At page 21 of its brief the State attempts to distinguish *Thomas, supra*, on the basis that there the defendant lessee had a right of access that was superior to that of the public lessor. However, the *Thomas* court observed that ownership and possession are merely two factors among many to consider in evaluating whether one has an expectation of privacy. *Thomas*, 642 N.E.2d at 244. The *Thomas* court explained:

> Indeed, a person may have a subjective expectation of privacy that becomes objectively reasonable in an area of his or her workplace. Such an expectation is not defeated merely because the area is accessible to others. This is because, as the Supreme Court stated in *Katz*[1]:
>
> > *the Fourth Amendment protects people not places.* What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, *even in an area accessible to the public,* may be constitutionally protected.

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[1] *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)

In other words, privacy does not require solitude. *Thomas*, 642 N.E.2d at 244-45 (emphasis added in *Thomas*; brackets, quotations, and citations omitted). Despite Thomas' cash register being, and his "questionable sales methods" occurring, in a location far more open and public than Lindalee Cowles' desk, *id.* at 242, the *Thomas* court nonetheless concluded that he had a reasonable expectation of privacy that he would not be subjected to warrantless video surveillance from the vantage point of the ceiling, *id.* at 244-47.

At pages 22-23 of its brief the State takes issue with Lindalee Cowles' observation that this Court's privacy jurisprudence has been animated in part by the concepts of notice and consent. The State, however, overstates Cowles' point.

The concept of consent is at the core of our constitutional heritage. As the Declaration of Independence proclaimed in 1776, "Governments derive their just power from the consent of the governed."[2] This was reiterated by Abraham Lincoln when he spoke that "no man is good enough to govern another man without that other's consent."[3] The same principle is evident in Article I, §2 of the Alaska Constitution which recognizes that the source of governmental authority is the consent of the people it governs. *See Falke v. Fairbanks North Star Borough*, 648 P.2d 597, 598 (Alaska 1982). Yet without notice there can be no

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[2] quoted in D. Shrager and E. Frost, *The Quotable Lawyer*, at 121 (1986)

[3] quoted in D. Shrager and E. Frost, *The Quotable Lawyer*, at 123 (1986)

effective consent. *See Erickson v. State*, 507 P.2d 508, 515 (Alaska 1973).

The cases discussed by Cowles and the State do stand for the proposition that the individual must be given prior notice of the prying camera or other warrantless privacy invasion, whether that notice be in the form of contact with an apparent police officer, specific notification of videotaping, or an employment contract that expressly contemplates drug testing. *See Luedkte v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1136-38 (Alaska 1989; *id.* at 1138-39 (Matthews, C.J., concurring); *City and Borough of Juneau v. Quinto*, 684 P.2d 127, 129 & nn. 8-9 (Alaska 1984); *Palmer v. State*, 604 P.2d 1106, 1108 (Alaska 1979); *id.* at 1113 (Boochever, J., concurring). In contrast, Cowles: (1) received no notification from her employer that her work area was subject to videotaping; (2) received no specific notification that she was going to be videotaped, neither by personally-conveyed information nor by placing the videocamera where its existence could be readily observed; and (3) received no notice that she was in the presence of police activity until she was confronted by the police after the video surveillance was completed. *Cf. Guidry v. State*, 671 P.2d 1277, 1283 (Alaska 1983) (upholding entry by police who were invited into defendant's house while posing as prospective home buyers; the Court observed that "perhaps if they had used concealed cameras to photograph the house surreptitiously without the benefit of a warrant allowing such conduct, that would approach the secret broadcasting and recording addressed in *Glass" v. State*, 583 P.2d 872 (Alaska 1978)).

At pages 23-25 of its brief the State tries to beef up the "fiduciary" justification relied upon by the Court of Appeals. In the process the State attempts to distinguish *Thomas, supra,* as being a non-fiduciary situation. Contrary to the State's contention, an agreement for revenue sharing, such as the lease in *Thomas,* whereby one party agrees to pay to another a share of revenue or other proceeds does create a fiduciary situation imposing certain obligations on the person initially receiving the revenue to be shared. *See Paskvan v. Mesich,* 455 P.2d 229, 232 (Alaska 1969); *cf.* 52 C.J.S. Landlord & Tenant §502(2) at 454-56 (1968). Thus, as between Cowles and Thomas, Thomas is the likelier candidate for being deemed to have been acting in a fiduciary capacity.

The State quotes the Court of Appeals' observation that "[v]ideo surveillance is commonly conducted in stores and commercial offices where money is exchanged, such as areas in banks were tellers work." (Brief of appellee at 23) Yet, the videocameras employed in banks and other commercial enterprises are ordinarily installed with express notice to the employees and are usually placed in a location as to be obvious to eye so that a lack of notice would be hard to claim. In contrast, the complete absence of prior notice is precisely why the purported "fiduciary nature" of Cowles' work does not defeat her reasonable expectation of privacy.

II. Lindalee Cowles Was Subjected To A Custodial Interrogation.

A. Standard of Review

At page 26 of its brief the State suggests that this Court should ignore the ruling of the United States Supreme Court that the ultimate question of whether an interrogation is custodial is determined by the appellate court exercising its own independent judgment. *See Thompson v. Keohane*, 516 U.S. 99, 114-15, 116 S.Ct. 457, 466-67, 133 L.Ed. 383, 394 (1995). Contrary to the State's contention, this Court is bound by the ruling in *Thompson* in that although *Thompson* was decided in the context of a federal habeas corpus petition, it involves an issue of federal constitutional law. *See id.*, 516 U.S. at ___, 116 S.Ct. 383, 133 L.Ed.2d at 394-96. The alternative would result in the absurd situation where an individual whose *Miranda*[4] rights were violated would be denied relief in Alaska's appellate courts due solely to the standard of review, and would then be forced to file a petition in federal court where relief would be granted due solely to the standard of review.

In practice, federal habeas corpus is far more deferential to trial courts and to the state-court decision making process than is direct appellate review in the state appellate court to United States Supreme Court system. The State's proposal would turn deference on its head.[5]

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[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

[5] Lindalee Cowles would note that like her case, *Thompson v. Keohane* appears to have originated in the Fairbanks trial

B. Discussion

Lindalee Cowles has thoroughly covered the *Miranda* issue in her Opening Brief. Nonetheless, a few responses to the State's contentions are in order.

As Cowles pointed out previously, Chief Florian's own explanation for interrogating Cowles at the police state indicates the coercive nature of the police getting her there. In essence, Chief Florian testified that his explaining to Cowles what was happening was conditioned on Cowles first coming to the police station. Such a Hobson's choice is coercive and for the purposes of *Miranda* is no choice at all. *See Webb v. State*, 756 P.2d 293, 295-97 (Alaska 1988); *see also Messerli v. State*, 768 P.2d 1112, 1122 (Alaska 1989). ("A person dealing with the government should not be forced to make a Hobson's choice when rights are involved.").

Finally, at pages 32-33 of its brief the State maintains that "[t]here is no indication in the record that Cowles' keys were seized and retained as she alleges." To the contrary, for one, there is Lindalee Cowles own testimony under oath. [Tr. 90] The fact that at some point, when Cowles was already at the police station, Chief Florian may have told her she could pick up her keys when she left [Exc. 14] bolsters Cowles' testimony that her keys were taken from her when she was served with the several search warrants.

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courts. *See Thompson v. Keohone*, 516 U.S. at ___, 116 S.Ct. 383, 133 L.Ed.2d at 394-96; *Thompson v. State*, 768 P.2d 127 (Alaska App. 1989).

Conclusion

For the reasons stated in this brief and in Petitioner Lindalee Cowles' Opening Brief, the decisions of this Court of Appeals and the trial court must be reversed. Thus, the video surveillance and the videotape the police made of Lindalee Cowles and any evidence obtained as a result thereof, including but not limited to statements Cowles may have made to the police and any evidence acquired via the search warrants, must be suppressed. Correspondingly, the indictment must be dismissed and a judgment of acquittal must be entered. Lindalee Cowles respectfully prays that the Court so order.

RESPECTFULLY SUBMITTED this 13th day of October, 1999, at Fairbanks, Alaska.

LAW OFFICE OF ROBERT JOHN

/s/ Robert John
Robert John, ABA # 8911069
Counsel for Petitioner Lindalee Cowles

IN THE SUPREME COURT OF THE
STATE OF ALASKA

LINDALEE COWLES,	)	
Petitioner,	)	Supreme Court No. S-8831
vs.	)	Court of Appeals No. A-6381
STATE OF ALASKA,	)	Trial Court No. 4FA-S95-2145 CR
Respondent.	)	
	)	

VRA Certification

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in A.S. 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

PETITION FOR REHEARING

COMES NOW Petitioner Lindalee Cowles, by and through her counsel Robert John, and pursuant to Appellate Rule 506, hereby petitions this Court for rehearing concerning its Opinion No. 5418 dated June 8, 2001.

First, Cowles petitions for rehearing under Appellate Rule 506(a)(3) in that the Court has overlooked a material question in the case. In this regard Cowles' Petition for Hearing filed October 16, 1998 raised two issues – (1) whether the warrantless videotaping of Cowles from a hidden camera installed by the police in the ceiling above her desk violated her constitutional rights and (2)

whether Cowles was subjected to a custodial interrogation requiring the police to have given her *Miranda* warnings. In its Order dated February 10, 1999, the Court granted the Petition for Hearing, and since the Court's Order did not specify otherwise, Hearing was granted as to all the points raised by Cowles. *See* Appellate Rule 305(a)(1). Correspondingly, the parties thoroughly briefed the issue of whether Cowles was subjected to a custodial interrogation. *See* Petitioner's Opening Brief at 38-44; Brief of Respondent at 26-33; Petitioner's Reply Brief at 8-11. Cowles thus respectfully requests that the Court grant rehearing and decide whether Cowles was subjected to a custodial interrogation.

Second, Cowles petitions for rehearing concerning pages 5 through 16 of the Court's Opinion where the Court discusses whether Cowles' expectation of privacy was a reasonable one and concludes that it was not. Rehearing in this regard is appropriate under Appellate Rule 506(a)(1) in that in rendering its decision the Court has misapplied the United States Supreme Court's decision in *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) and has failed to consider the United States Supreme Court's June 11, 2001 decision in *Kyllo v. United States*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2001), 2001 WL 636207 (U.S.) (copy attached).

As the dissenting Justices in Cowles' case have observed, the plurality opinion in *O'Connor* does not constitute the holding in that case; rather, the concurring opinion of Justice Scalia, coupled with the four-Justice plurality or the four-Justice dissent, as the case may be, comprise the binding precedents in *O'Connor*. *See Cowles* at 24-26 (Fabe, J., joined by Bryner, J., dissenting). For

one, the plurality in *O'Connor* recognized that the majority of the Court – Justice Scalia plus the four-Justice dissent – held that Ortega had a reasonable expectation of privacy in his office. *O'Connor*, 480 U.S. at 714, 94 L.Ed.2d at 723; *see id.*, 480 U.S. at 737, 94 L.Ed.2d at 735 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).

Likewise, when Justice Scalia's concurrence is combined with the four-Justice dissent, the unconstitutional nature of the police conduct in Cowles' case is apparent. Justice Scalia concluded that "one's personal office is constitutionally, protected against warrantless intrusions by the police, even though employer and co-workers are not excluded." *Id.*, 480 U.S. at 730, 94 L.Ed.2d at 731 (Scalia, J., concurring). "Thus, although an employee might well have no reasonable expectation of privacy with respect to an occasional visit by a fellow employee, he would have such an expectation as to an after hours search of his locked office by an investigative team seeking materials to be used against him at a termination proceeding." *Id.*, 480 U.S. at 738, 94 L.Ed.2d at 736 (Blackmun, J., joined by Brennan, Marshall and Stevens, JJ., dissenting). Accordingly, even though Cowles had coworkers .n her office, Cowles had a reasonable expectation of privacy against the warrantless, after-hours intrusion of the police installing a hidden video camera in the ceiling above her desk.

The same follows from the recent decision in *Kyllo, supra*, which holds that the police use of thermal imaging constitutes a search:

> The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. The police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful.

Kyllo, 2001 WL 636207 at 4 n.2. Indeed, Justice Scalia, the author of the majority opinion, described the thermal imaging in *Kyllo* as "somewhat like a video camera showing heat images," *id.* at 2, the use of which involved "more than naked-eye surveillance," *id.* at 5. Accordingly, under *Kyllo* or even under the approach of the dissent in *Kyllo*, which finds that a search occurs when technology offers the functional equivalent of the police actually being present in the structure, *id.* at 6; *id.* at 10-12 (Stevens, J., joined Rehnquist, C.J., and O'Connor and Kennedy, JJ., dissenting), Cowles had a reasonable expectation of privacy that the police would not install a hidden video camera in the ceiling above her desk to monitor her activities.

In conclusion, the Court should grant rehearing and should reverse the decisions of the trial court. Lindalee Cowles respectfully prays that the Court so order.

DATED this 18th day of June, 2001.

LAW OFFICE OF ROBERT JOHN

/s/ Robert John
Robert John, ABA #8911069
Counsel for Petitioner

Certificate of Service
I certify that a true and correct copy of this document was served by U.S. Mail on Ken Rosenstein/OSPA this 18th day of June, 2001.

/s/ Robert John